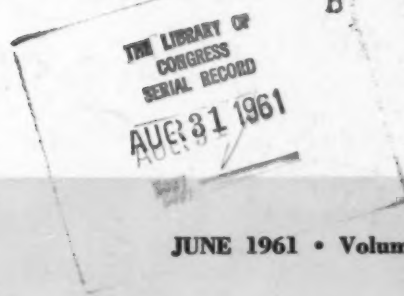


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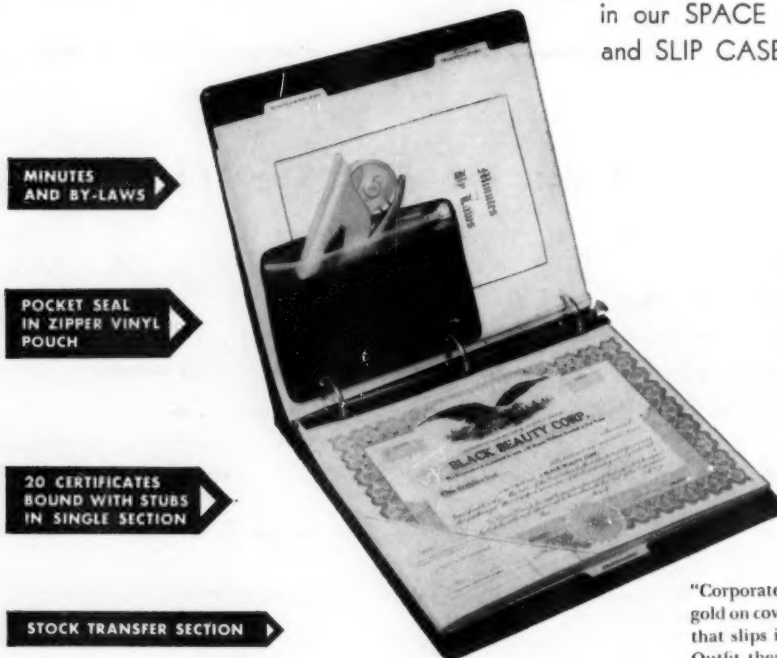
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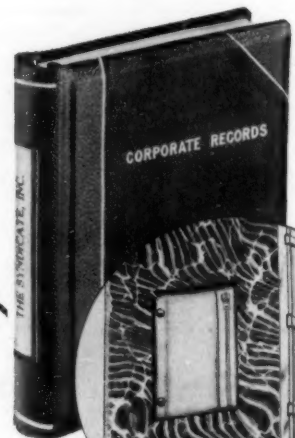
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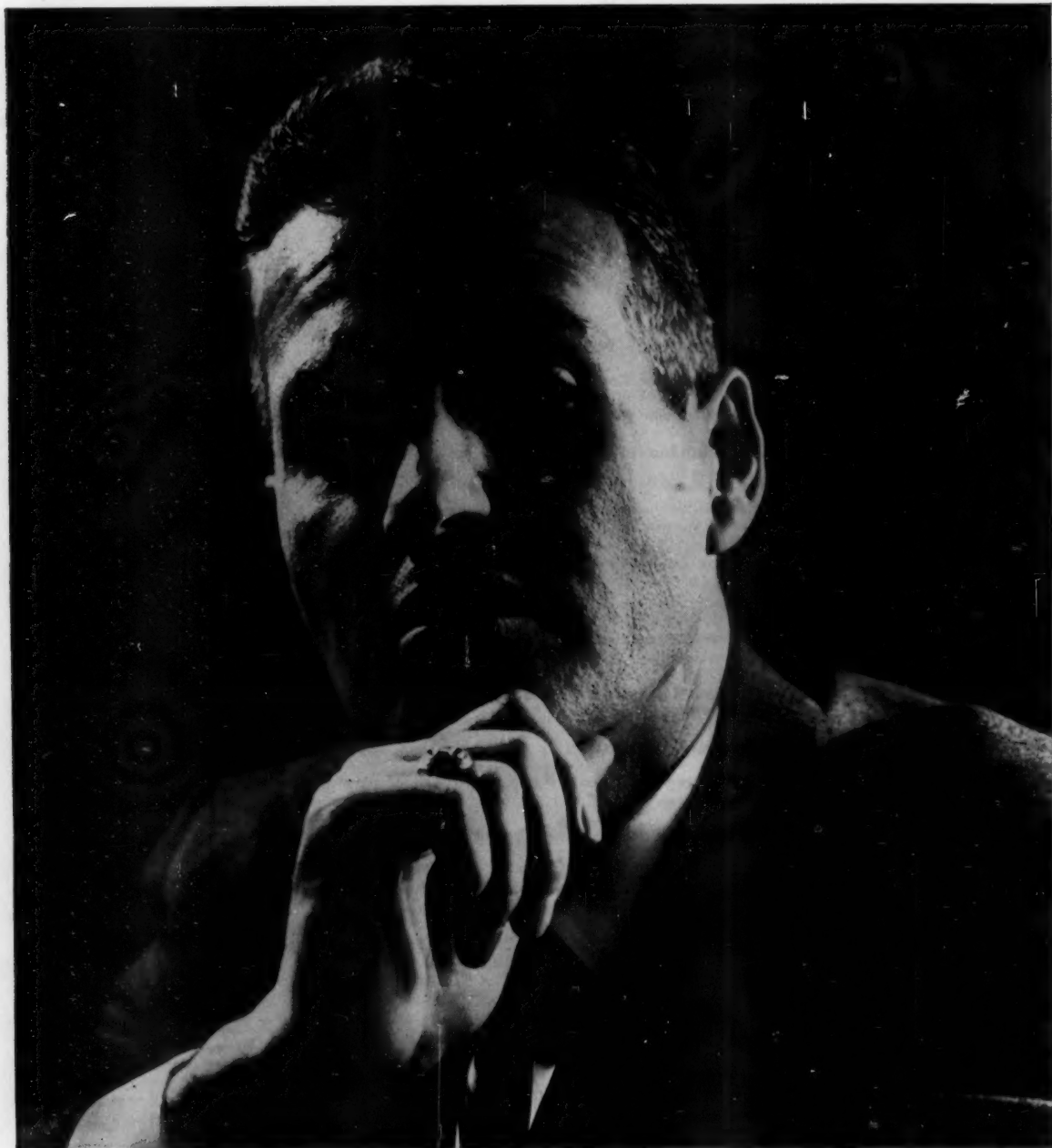
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The President's Page

Whitney North Seymour



The recent death of our well-loved Editor-in-Chief, Tappan Gregory, is a sad loss to the Association and to his many friends. He had been recovering nicely from last year's virus when a series of mishaps proved to be too much for his heart, large though that was.

Tap was a notable leader of the organized Bar, city, state and national. He worked quietly, firmly and steadily. He loved the great traditions of the Bar; he upheld them and encouraged others to do so. He edited this *Journal* with grace and style and made us very proud of it.

This is not the place for a formal memorial, but some personal things can properly be said here. He had a quality of kindness and gentleness, coupled with a character like spring steel. He was more than usually allergic to stupidity and meanness. He had sensitive good manners and always followed the etiquette of the profession in advocacy. Thus when he differed on a point, he advanced his views moderately and, however strongly he held them, he did not exhibit that amateur quality which accuses those of different opinions of rascality or lack of good faith. Honorable himself, he indulged the presumption that others were hon-

orable too.

Tap's generous and friendly spirit helped to make almost a generation of new members of the House feel at home at the meetings. "Tap's Room", maintained so long with his fine friend and ours, Steve Hurley, was a congenial headquarters or port of call for hundreds of us. Over the years, the Association's guests tended to gravitate there and one could find John Black, the singing dean of the Chicago Bar, Judge Medina, Judge Dimock, Sir Godfrey Russell Vick, and many others lifting their voices until a fairly late hour. There, too, one would be likely to find Lord Birkett, Lord Morris, Sir Edwin Herbert, Sir Harry Hylton-Foster, and, more recently, Ralph Risk, Sir George Coldstream, Geoffrey Lawrence, Denys Hicks, Sir Thomas Lund or Robin Boulton, and only this February, Lord and Lady Shawcross charmed their admirers there when he came to speak to the Fellows. My wife and I learned the spirit of brotherhood in the Association there at Tap's feet. Occasionally he would modestly lift the veil on one of his hobbies and show a charming photograph of some young, startled animal, quietly stalked at night by Tap with camera and flashgun, revealing a taste for the strange and

beautiful natural life which has not been spoiled by civilization.

Tap's death makes us reflect on the quality of the contribution which a fine lawyer makes during his career to his profession and his fellow men. It differs from the contributions of those who leave buildings, businesses or other tangible monuments. The main contributions of the lawyer are intangible and they tend to dissipate in society as time passes. A whole complex of people directly and indirectly helped and inspired—clients, friends, fellow lawyers and community leaders—go on for a time with a deeper sense of the values of justice, loyalty, wisdom, fairness, kindness. Then there is the contribution to the moving stream of the life of the profession, the clear, pure water which counteracts and dissipates the occasional muddy eddies which, if left alone and undiluted, might pollute the whole stream. The echoes of such a life remain with us and go reverberating on in the minds and hearts of those who knew him and then are conducted outward to affect the lives of those to whom he was unknown. As one looks back over our history, we realize that many lawyers are unsung and unremembered, yet we

(Continued on page 626)

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Source of Marx Quotation

Mr. Brown's article on liberty, March, 1961, issue, contained a reference to Karl Marx and his statement that "religion is the opium of the people". As a point of historical fact and interest, Marx was the second to express this sentiment. The first was an Episcopal minister of some prominence. Charles Kingsley, author as well as minister, said upon the advent of the 1848 Christian Socialist movement led by him, F. D. Maurice (a theologian) and J. M. Ludlow (a lawyer), that:

We have used the Bible as if it were a mere special constable's handbook, an opium dose for keeping beasts of burden patient while they are being overloaded.

Interestingly enough, this was the year the *Communist Manifesto* appeared.

CAMERON K. WEHRINGER
New York, New York

The World Court and American Sovereignty

In the recent discussion on repeal of the Connally Reservation much has been made of the "sovereignty" which the United States would relinquish. Huntington Cairns, in his book, *Law and the Social Sciences*, discusses sovereignty and points out that theoretically sovereignty cannot apply to the United States (page 226). In addition, he discusses the theory from utilitarian and ethical viewpoints, and shows, I believe that it is a mere shibboleth—actually, the consent of the governed

is the only true sovereign.

Submitting matters to the World Court, as Blair C. Wood pointed out in his letter in the December issue, is merely an agreement to submit the matter to the court rather than go to war. The resort to war is just as illegal before submission to the court as after, is it not?

If we want to refuse to submit disputes to the World Court because we are a strong nation and can enforce our will on the weak ones, let us admit it to ourselves, not blind ourselves with meaningless references to "sovereignty".

SIZER CHAMBLISS

Chattanooga, Tennessee

Why We Shouldn't Repeal Connally Reservation

Those who would repeal the "Connally Amendment" to U. S. acceptance of World Court jurisdiction are as naïve as those who promoted the adoption of the U. S. Constitution believing that the powers of the Government created thereby would be "few and defined", and would remain so!

Looking back over the decisions of our own federal judiciary since 1936, how can anyone sincerely believe that the judges of the World Court (who do not have to be trained in the law and most of whom come from countries the legal systems of which are quite different from ours), would never render a decision in a case involving a matter which we considered a domestic question?

In his article which begins on page

57 of the January, 1961, issue of the *American Bar Association Journal*, Mr. Gambrell, of the Atlanta Bar, says (page 60) that the World Court is given authority to decide only two kinds of questions of law, namely, questions of the interpretations of treaties and questions of international law. But who is to say what is or is not "treaty" or "international" law?

There is nothing in the U. S. Constitution which says that the U. S. courts have authority to determine the meaning of the Constitution, but the federal judiciary has assumed that right! The U. S. Supreme Court has even gone further and has assumed the right to "reinterpret" a previous decision by it, in which it interpreted a section of the U. S. Constitution to have a particular meaning. While more than 170 million Americans are bound by Article V of the U. S. Constitution, a majority of the nine men who make up the U. S. Supreme Court, can alter the "accepted" meaning of any part of the U. S. Constitution at any time it suits them. Are the judges of the World Court less likely to assume authority?

The Tenth Amendment to the U. S. Constitution was one of the amendments required by the states as a condition for the adoption of the Constitution. Whoever thought our federal courts would relegate that Amendment to the status of a "repealed" amendment and completely disregard its provisions? Isn't it as likely that the World Court Judges might rule out some or all of the restrictions placed on them by the Charter?

Have the decisions of the federal courts since 1936 made things better in the United States? Do we have less crime as a result of such decisions? Have such decisions promoted honesty and integrity in our people? Has the result of such decisions been peace and tranquility, and unification of our people? I would answer all of such questions in the negative.

Having the example of our federal judiciary before me, I shudder to think what Judges of the World Court as currently constituted might do.

I know that we must find a better way than war to settle our disputes, but
(Continued on page 542)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Local Government Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of

any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are \$20.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are \$5.00 per year, and for three years thereafter \$10.00 per year, each of which includes the subscription price of the *Journal*. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, \$5.00; Antitrust Law, \$5.00; Bar Activities, \$2.00; Corporation, Banking and Business Law, \$5.00; Criminal Law, \$2.00; Family Law, \$5.00; Insurance, Negligence and Compensation Law, \$5.00; International and Comparative Law, \$5.00; Judicial Administration, \$3.00; Labor Relations Law, \$6.00; Mineral and Natural Resources Law, \$7.00; Local Government Law, \$5.00; Patent, Trademark and Copyright Law, \$5.00; Public Utility Law, \$5.00; Real Property, Probate and Trust Law, \$5.00; Taxation, \$8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: \$20.00 for lawyers first admitted to the Bar in 1956 or before; \$10.00 for lawyers admitted in 1957, 1958 and 1959; and \$5.00 for lawyers admitted in 1960 or later.

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■ The *Journal* is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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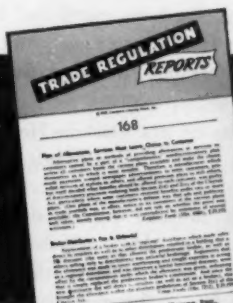
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(Continued from page 538)

local problems can be settled peaceably only by local people. Until we in this country can find a way to require judges to "stick" to the law and leave "law-making" to the legislative bodies and to the people, I do not feel that we are ready to suggest ways and means of setting up a World Court.

R. M. SASNETT, JR.

Columbia, South Carolina

An Honest Politician Defined

Walker Lewis, in his article "The Hayes-Tilden Election Contest", concerning efforts of the Democrats to buy an electoral vote, comments, "If the Democrats bought any one who could swing an electoral vote, he did not stay bought." This recalls the well-known definition of an honest politician, attributed to Simon Cameron, Republican boss of Pennsylvania, and a member of Lincoln's Cabinet, "One who, when he is bought, will stay bought".

LEONARD L. EWING

Beaver, Pennsylvania

The Purpose of a Lawsuit

The article by Judge Musmanno on the Sacco-Vanzetti case in the January, 1961, issue of the *Journal* is certainly revealing. The tactics of both the prosecutor and the trial judge are certainly open to question.

It raises a point which I would like to see discussed further in the *Journal*, namely, how far may an attorney go in the interests of his client in an adversary proceeding to protect his client's legal rights? May an attorney conceal admissible evidence helpful to his adversary?

After twenty years of trial practice, I have concluded that the only purpose of a lawsuit (criminal or civil) is to discover the truth and that it is the clear duty of all attorneys in a legal proceeding to assist the court in reaching that goal, even if it means victory to the adversary.

I raise this question with the knowledge that the majority of the American Bar violently disagrees with my view.

It appears to me that, morally, the

"anything goes" attitude is untenable.

NICHOLAS GRANET

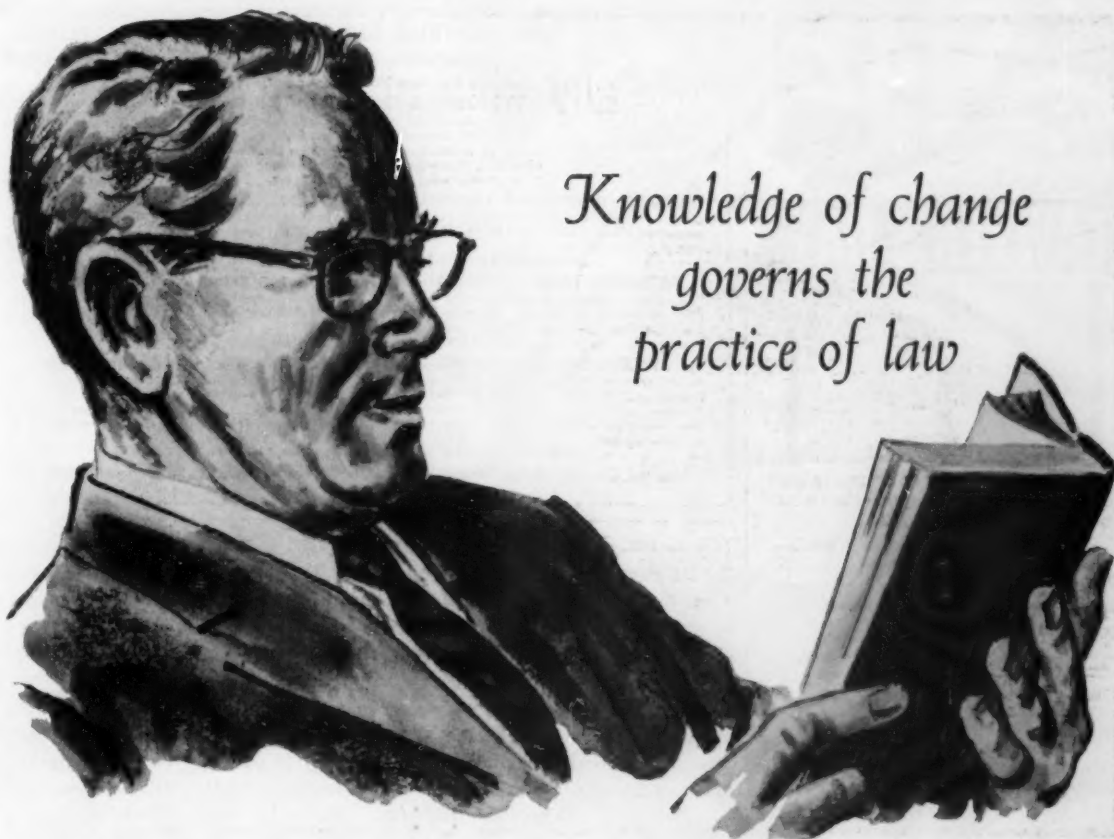
Torrance, California

Dutch Labor and Economics

In his January, 1961, article addressed to the American businessman, "A Eurosite for American Business—a la Dutch Treat", James N. Johnson calls the Netherlands, "A Modern 'Land of Milk and Honey'". This description is most intriguing when one considers the facts marshaled by Mr. Johnson from the vantage point of the Dutch workingman rather than from that of the investor.

Unions do not exist in Holland, as they do in the United States, says Mr. Johnson, but there are labor leaders who are "infected with the driving impulse to exert the unselfish introspection so characteristic of the Dutch". The results of the collective bargaining conducted by these "unselfish" labor leaders, to which negotiations

(Continued on page 544)



"Let no act be done at haphazard, nor otherwise than according to the finished rules that govern its kind"—thus the admonition of Marcus Aurelius comes down through the centuries and finds particular application in the contemporary practice of law.

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(Continued from page 544)

have expressed serious doubts as to whether customary international law, absent treaty or concession agreements, invariably requires the payment of compensation for the expropriation, i.e., confiscation, of property belonging to aliens. (Baade, "Indonesian Nationalization Measures Before Foreign Courts—A Reply", 54 A.J.I.L. 804, and footnotes 22 and 23 (1960).) The view is increasingly gaining acceptance that "at the very least, it must be admitted that the assumption that nationalization without compensation generally held to be a violation of international law, is no longer valid" (Friedman, "Some Impacts of Social Organization on International Law", 50 A.J.I.L. 904 (1956).) . . .

It is somewhat interesting that in the note delivered by Ambassador Philip W. Bonsal to the Cuban Ministry of Foreign Affairs on July 16, 1960, the principle of international law contended for by Mr. Allison is further limited in the scope of its acceptability among nations from Mr. Allison's "non-Communist world" to

the "free countries of the West" (*The Department of State Bulletin*, Vol. 43, August 1, 1960, page 171). Loftus Becker, the eminent learned legal adviser of the State Department, would even limit the doctrine further; in fact, so far that its very expression would be best not made in those "circumstances where it becomes the focus for all the extreme feeling against colonialism and economic imperialism" ("Just Compensation in Expropriation Cases: Decline and Partial Recovery", *Department of State Bulletin*, Vol. 40, June 1, 1959, page 784 *et seq.*)—in effect in two thirds of the world today. If this is what Mr. Allison refers to in the phrase "some quarters", then I must agree with him.

But if this is a doctrine or principle which must be hidden or concealed, then how valuable is it, or how much prestige can be gained from vouchsafing its merit? I believe that Arthur Larson stated at the Harvard Law School on May 1, 1959, that the common law of nations must be substantially built upon the legal principles, at least in part, of those formerly colonial and now underdeveloped na-

tions of the world whose acceptance of legal order and the rule of legality is so vital if that rule is to mean anything, and whose reluctance, in part, to accept the same, has been based on the realistic misgiving that "...19th century international law [is] the private preserve of western and colonial powers" (*Cong. Rec.*, August 6, 1960, page 13985 at 13986) . . .

If Mr. Allison would look at the *Congressional Record* for March 6, 1961, he would see there a speech delivered by Representative Rutherford, of Texas (page 3041-3044) on trade with Mexico. Not only would the figures given show that this trade has been economically meaningful to both nations, but that Representative Rutherford felt that the nationalization of industries, including the oil industry, by the Republic of Mexico, has been to the benefit of the people of that country, and that while the Republic of Mexico invites foreign investments, they do not "invite foreign investments to become a predominant factor" in the economy of that nation. The example of Mexico, I believe, is just one case in point, and similar situations exist in other jurisdictions where property has been nationalized or expropriated. . .

Finally, I think Mr. Allison would agree that for a supposed principle of international law to be so circumscribed in terms of its acceptability in the world today, particularly among nations that our Government is trying to show the light to, is tantamount to asserting that the doctrinal viability of the principle is seriously open to doubt. I am sure Mr. Allison is well aware of the great difficulty which has recently been experienced in having this principle which he contends is "usually accepted in the non-Communist world" incorporated in multilateral conventions and codes designed for the protection of foreign investment. (See the discussion on the Abs-Shawcross Code for the Protection of Foreign Investment in the *Journal of Public Law*, Spring, 1960.)

Perhaps Mr. Allison might well take a leaf from the works of that great English constitutional historian, Henry Hallam, who should have, as a knowl-

(Continued on page 552)

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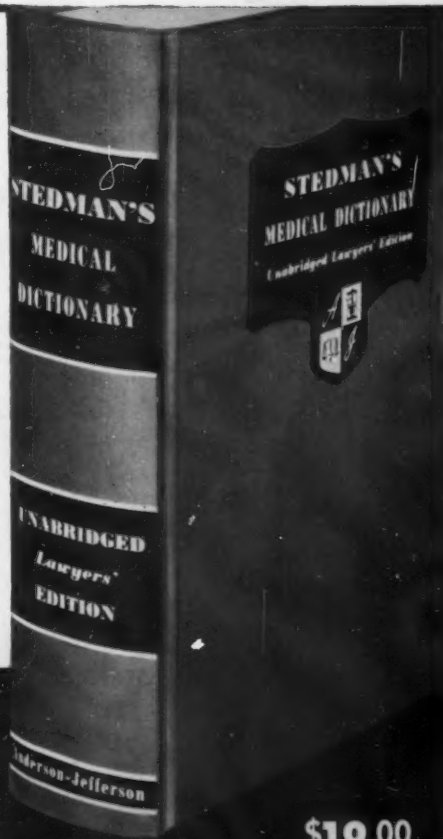
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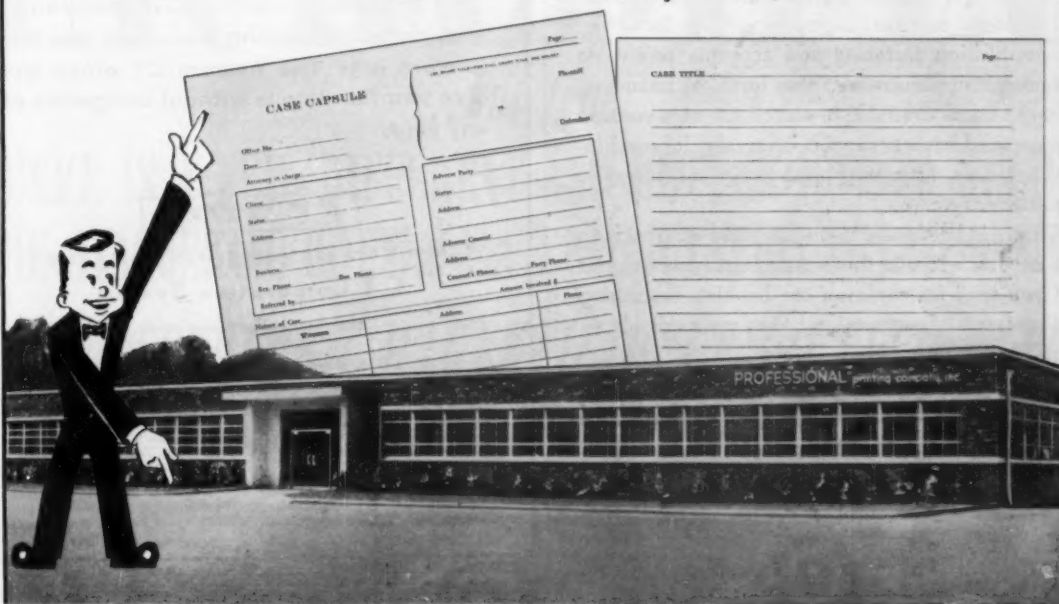
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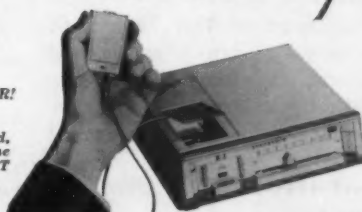
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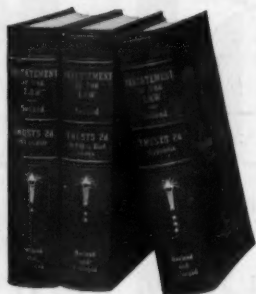
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(Continued from page 546)

edgeable conservative, been shocked and appalled by Henry VIII's confiscation of monastic properties in England, but after all, wasn't. (*1 Constitutional History of England*, New York, 1877.)

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Maybe Mr. Corcoran Wanted To Be Anonymous

I have just read the article in the March issue of the *Journal* by Richard N. Ivins, of the Tennessee Bar, on the subject of private communications with administrative agencies.

I was surprised that Thomas G. Corcoran was referred to as "Thomas G. Cochran" throughout the article in view of the prominence which Tommy Corcoran has enjoyed for nearly thirty years.

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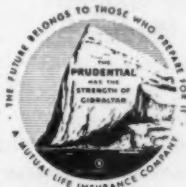
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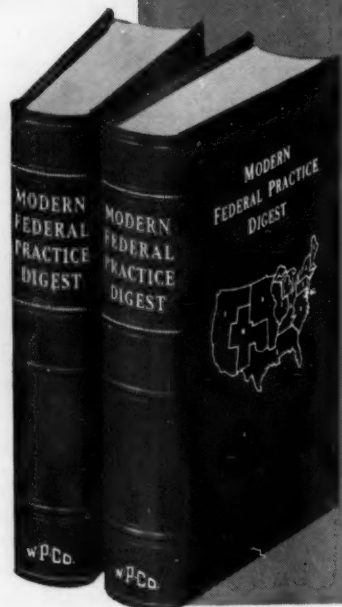
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Criminal Justice in Japan:

Its Historical Background and Modern Problems

Mr. Abe's article is an excellent short statement of Japanese criminal law—a system whose origins are older than our common law. The article is taken from an address delivered last year before a dinner meeting of the Chicago Chapter of the Federal Bar Association.

by Haruo Abe • *Public Prosecutor, Japanese Ministry of Justice*

JAPAN HAS A unitary legal system; there is only one territorial jurisdiction, which is on a national level. Criminal procedure is the same all over Japan. The Code of Criminal Procedure of 1948 and the Rules of Criminal Procedure of 1949 are the principal sources of law which govern that procedure. Since Japan is a civil law country, case law has only secondary importance.

Criminal Justice in Japan

The structure of the court system consists of a hierarchical pyramid of courts of three instances. Criminal cases are handled by 570 summary courts and forty-nine district courts—both of which are courts of first instance; eight high courts—which are courts of second instance or courts of appeals; and the Supreme Court which is the court of third instance, or of final resort. Either one or three judges may sit on a case in a district court, depending on the nature of the case, whereas three judges sit in a high court. In the Supreme Court, fifteen justices constitute a full bench and three (or more) a petit bench.

Criminal procedure is based on the adversary system and the principle of free evaluation of evidence (*principe de l'intime conviction*). There are exclusionary rules of evidence, and con-

viction must be based on competent evidence. No one may be compelled to testify against himself, and the defendant may testify in his own behalf without taking the witness stand and, consequently, without incurring the risk of committing perjury. The accused is considered to be innocent unless and until proved guilty beyond reasonable doubt; in a case where the evidence is not conclusive one way or another, the accused is acquitted. There are no juries in Japan. Cases are tried by trained professional judges. From 1928 to 1943 there was a law in effect which required trial by jury, but it has been in abeyance for the past seventeen years for financial and sociopsychological reasons. As a matter of fact, while that law was in effect, 99 per cent of the accused waived trial by jury, because they presumed that the judges were usually more lenient than lay jurors.

Decisions of the lower courts may be appealed in higher courts, but the Supreme Court considers appeals only in cases involving constitutional issues or some types of problems of vital importance. The prosecution also may appeal from decisions of lower courts which declare the accused not guilty. We do not have the equivalent of the writ of *habeas corpus*, but instead our system employs various remedial devices, such as "extraordinary appeal" and "reopening of procedure". If a

sentence becomes finally binding it must be carried out, but convicts may be released conditionally on probation or parole.

The procedure of criminal investigation is regulated by law. The principal investigating agencies are the police and the public prosecutors, who share this function and co-operate in carrying it out. The police primarily obtain the criminal evidence and the public prosecutors supplement it through further investigation. The exercise of investigative powers upon persons or things having evidential value is generally subject to judicial control in the form of warrants for arrest or search and seizure. For example, arrests may be made only on the basis of a warrant issued by a judge, except in cases where a person is arrested at the scene of the crime or immediately thereafter. We do not have the process of "preliminary hearing"; however, the arrested individual must be taken to the detention judge to be heard without delay. The Code of Criminal Procedures provides that this must be done within seventy-two hours of the time of arrest.

Another institution which we do not have in Japan is that of the grand jury. The function of initiating and carrying on prosecution is assumed primarily by public prosecutors. Prosecution is instituted by the filing of a written indictment or, rather, an infor-

mation with the trial court of the first instance. Generally speaking, public prosecutors in Japan are cautious about initiating such action; they prefer to drop a case if they believe that it will be difficult to convince the court beyond reasonable doubt, even in instances where it may be easy to make a *prima facie* case. This is the principal reason why the acquittal rate in Japan is extremely low. From 1953 to 1957, out of about 580,000 defendants, only about 4,000 or 0.7 per cent were found "not guilty". Furthermore, even in cases where they are convinced of the guilt of suspected individuals, public prosecutors may refrain from prosecution if they consider such a course of action conducive to the successful rehabilitation of the offender. This is the so-called principle of discretionary prosecution, or *principe de l'opportunité des poursuites*. As a result of the use of this discretionary power, approximately 37 to 47 per cent of suspects are exempt from prosecution. In order to prevent the misuse of this power by public prosecutors for political or other reasons, the Japanese law provides a public check in the form of "quasi-public prosecution" and "the inquest of public prosecution". Under the process of "quasi-public prosecution" a private complainant may counteract the public prosecutor's plea of this power by petitioning the court to issue an order of prosecution. If the court considers such a petition reasonable, it may issue an order of prosecution and must in such a case appoint an *ad hoc* public prosecutor from among private lawyers in order to avoid a possibility of biased prosecution. Another device for checking the abuse of the discretionary authority of public prosecutors is the system of "Inquest of Prosecution". The inquest of prosecution, or prosecution investigation committee, is a body consisting of eleven lay people chosen by lot from among ordinary citizens. The function of this body is to investigate and control in a democratic and advisory way the discretionary authority of non-prosecution of public prosecutors. Each of the forty-nine judicial districts throughout Japan has such a controlling committee.

While undergoing investigation the

suspect has at all times the right to counsel and the privilege of communicating with the outside. A court may not open the trial of a defendant charged with certain serious offenses without affording him defense counsel. If the accused cannot afford a lawyer, the court must assign public counsel on its own initiative and at the expense of the government. The accused is also entitled to be released on bail except in certain serious cases prescribed by law. The average amount of bail money required is relatively low. In terms of American currency, the amount of bail money required in murder cases may be as low as \$200 and is never more than \$3,000.

The Japanese legal profession consists of three categories of lawyers—judges, public prosecutors and practicing attorneys. We have about 2,300 judges, including fifteen Supreme Court Justices, 500 assistant judges, 700 summary court judges, and 1,700 public prosecutors, including some 700 assistant public prosecutors. Of practicing attorneys there are about 6,000 who belong to about fifty local bar associations which are organized into one national co-ordinating organization—The Japan Federation of Bar Associations.

In order to become a lawyer of any category, a candidate generally must take the National Law Examination held annually by the Ministry of Justice. Today almost all law candidates are university law department graduates. Only a small number of the law graduates take this examination after graduating; the great majority of them obtain employment with private enterprises or governmental organizations. The standards of the national examination are fairly high; of approximately 7,000 candidates who take the examination annually, only about 300, or 4 per cent, pass.

Candidates who pass the examination receive appointments from the Supreme Court as law trainees to undergo a legal apprenticeship of two years' duration before entering the profession. The first four months and the final four months of that period are spent in the classrooms of the Legal Training and Research Institute, and the remainder of the time is devoted to

field practice in courts, public prosecutor's offices and law firms, under the supervision of the Institute. Upon completion of this training, apprentices must pass a final examination before they are qualified for the profession. Successful graduates have the choice of becoming assistant judges, public prosecutors or practicing attorneys. Once the choice is made, it is rather rare for them to change their field, although theoretically there is interchangeability among the three branches of the legal profession. It is particularly unusual for a successful practicing attorney to become a judge or a public prosecutor, although he can do so if he wants. A strong bureaucratic sentiment has grown among professional judges and prosecutors in Japan which has resulted in a marked degree of professional stagnation. However, a new movement toward a so-called "unified legal profession" is gaining impetus and is expected to introduce some freedom of action in this regard.

From the Eighth Century to the Year 1889

From the eighth century to the 1860's, criminal justice in Japan was strongly influenced by Chinese legal tradition. Ancient Chinese penal codes were adopted wholesale, but underwent considerable modification so as to suit conditions in Japan. The codes thus adopted were administered and supplemented by a body of precedents and ordinances which was built up through the centuries. The spirit basic to the administration of criminal justice was an amalgam of traditional Japanese morals under feudalism and the Japanese interpretation of Confucian ethics.

Subsequent to the 1860's the Japanese system of criminal justice has undergone two revolutionary changes; the first one occurred in the 1870's, following the Meiji Restoration under the influence of European legal culture, and the second one got under way in 1946 following the termination of World War II, under the influence of Anglo-American legal tradition.

In 1868, the Tokugawa Shogunate's Government collapsed and was suc-

ceeded by the more progressive government of the Emperor Meiji. Needless to say, it took time for the new government to do away with all the feudalistic remnants. For example, it was not until 1879 that legalized torture was entirely abolished. Beating and "stone holding" had been common techniques employed to extort confessions from prisoners. The latter consisted of forcing the prisoner to sit on a corrugated wooden seat holding a flat stone weighing about 100 pounds on his lap.

The criminal statutes of the 1870's had retained the provisions for torture devices. Moreover, Article 318 of the Revised Criminal Code of 1873 provided that "the accused shall be found guilty by the conviction of the court based upon his confession". This provision, which embodied the principle of "no conviction without confession" helped to enthrone confession as "the queen of evidence". Then there occurred an event which contributed to the modernization of criminal justice in Japan. It was a typical instance of the shock often experienced by Westerners at their first contact with some barbarous practice prevailing in a Far Eastern country that in many ways was among the most highly cultured in the world.

It happened one spring afternoon in 1875 when a gray-haired, moustachioed Frenchman was passing by the Tokyo High Court Building on his way to the Law School of the Justice Ministry where he was going to give a lecture. Suddenly he was startled by a half-human, half-animal scream which issued forth from the court. His curiosity vitally aroused, he walked quickly into the building and made his way to the room from which the terrible noise was emanating. Opening the door, he was paralyzed with horror at the sight of a man seated on a rigidly corrugated board holding a big stone slab on his lap, screaming under the brutal torture. Who could have imagined such cruelty within a court of law in broad daylight in the nineteenth century! Shocked to the core, the Frenchman began to shudder and cry, like a child who has seen a ghost in the dark.

The gentleman was Professor Boissonade

who had been invited to come to Japan by the Japanese Government to codify and modernize the legal systems of Japan. He lost no time in urging the Minister of Justice to abolish the practice of torture as manifestly repugnant to the modern spirit of criminal justice. In 1876, acting upon the advice of Professor Boissonade, the government changed the wording of Article 318 of the Revised Criminal Code to provide that "the accused shall be found guilty by evidence". This was the first step toward reform. In 1879, the age-old torture system was statutorily abolished. In 1880 the Criminal Procedure Law drafted by Professor Boissonade after the model of French law was enacted. Thus, under the influence of the European culture of the nineteenth century, the new Japan embarked on the road to the eventual modernization of her legal system.

Development Under the Old Constitution

Even prior to World War II, Japan had a constitutional law which was to some extent based upon the principles of the rule of law and representative government. The Imperial Constitution of 1889 provided for the separation of powers and contained a limited bill of rights. Under that Constitution criminal justice was administered under the law as enacted by the national legislature. However, Japan was far from being a modern democratic country. She was reigned over and ruled by the Emperor who was regarded as an incarnate deity and the ultimate source of sovereign power. The principal characteristic of this old regime was its compromise between the ideal of modern constitutionalism and the traditional principle of government by the Emperor. Under such constitutional monarchy the principle of the rule of law could not be fully implemented. The civil rights of the subjects were prone to be restricted by the prerogative superiority of the Emperor's Government. It should also be noted that leading politicians and jurists in those days could not fully comprehend the significance of the role of the bill of rights. The fact that even members of the drafting body were not fully aware



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of the meaning of a bill of rights is illustrated by the following dialogue, which is reported to have occurred in the course of the constitutional conference in the privy council between Prince Ito, the Chairman, and Mr. Mori, one of the privy councillors, in connection with the chapter entitled "The Rights and Duties of Subjects".

Mr. Mori suddenly stood up and cried out indignantly: "Mr. Chairman! I object to the wording 'the rights... of the subject'. It is repugnant to our national tradition. We Japanese subjects may have bestowed upon us limited status of responsibility to the Emperor, but never rights". Prince Ito calmly replied: "Your argument ignores the fundamental theories of constitutional law. One of the main objectives of creating a constitution is, in the first place, limitation of the sovereign power, and secondly, the protection of the people's rights. If these objectives are not attained, the sovereign will have infinite and uncontrolled power; whereas, the people will owe unlimited responsibility to the

sovereign. That is absolute monarchy. If we eliminate the bill of rights from the constitution, what protection will it afford?"

Under the Imperial Constitution of 1889, the Penal Code of 1907 and the Code of Criminal Procedure of 1890 were enacted. The latter was replaced by the Code of Criminal Procedure of 1922. Judging from the letter of the law of the new statutes, there seemed to be no substantial difference between the modernized criminal justice of Japan and that of European countries. Criminal justice based on these new laws was strongly influenced by German legal theories and considerably colored by the liberalism of the nineteenth century. For instance, the new system adopted the accusatorial system and the principle of trial on evidence. In effect the blueprint of the machinery of criminal justice under the new system was fairly satisfactory. Unfortunately, the application of that machinery took an altogether different course from what had been intended. The practice of forcing confession became rather common among the police; prisoners were often kept incommunicado; the preliminary examination, which was kept secret from the public, became a sort of Star Chamber affair. Moreover, the militaristic totalitarian atmosphere which had been growing under the old regime was prone to condone the uncivilized practice of investigating officials on the grounds that criminals, especially political offenders, were enemies of the Emperor. This unsatisfactory situation persisted until the termination of World War II, after Japan had experienced the blast of the first A-bomb at Hiroshima in 1945. Subsequently the country set about the task of establishing a more democratic form of government under the strong influence of Anglo-American legal thinking.

Reform Under the New Constitution

The governmental system of Japan underwent a fundamental change when the new Constitution of Japan came into force in 1947. This occurred during the occupation of the Allied Powers following the termination of World War II. Under the new Constitution,

with the establishment of a revised parliamentary system, the principle of a parliamentary cabinet and a completely independent judiciary, a democratic government came into being. The Emperor has descended from the position of incarnate god and has lost his political power; he is now merely "the symbol of the State and the unity of the people". Under the new regime the principle of the rule of law in its pure and perfect form has been embodied in the existing legal system through the constitutional guarantee of fundamental human rights and the creation of a system of judicial review over administrative and legislative action. With the establishment of the revised governmental system under this new Constitution, Japan has achieved the semblance of a modern democratic state—at least from a legal point of view. It was against this historical background that the new Code of Criminal Procedure of 1948 was enacted. The functions of the reformed machinery of criminal justice in Japan can be appreciated only in the new light of the postwar regime.

As I mentioned before, the Code of Criminal Procedure of 1922 was based in its entirety on European (particularly German) law. On the other hand, the new Code of Criminal Procedure of 1948, which was enacted under the new Constitution of 1946, has largely adopted Anglo-American devices to protect human rights, although schematically it is still based on the Continental tradition of law. Thus, I should say that the present system of criminal justice in Japan is a mixture of Continental (especially German) and Anglo-American traditions of law.

Problems Under the Present System

My discussion may have created the impression that the human rights of the Japanese people are well protected by a modernized machinery of criminal justice efficiently operated by well-trained lawyers. But nothing is farther from the truth. Unfortunately, a beautifully drawn blueprint is not necessarily a guarantee that the actual functioning of the designed machinery will be efficient. Moreover the modernization of legal machinery does not

ensure the concomitant modernization of the mentality of the lawyers who operate that machinery.

One of the defects found belatedly in the present system of criminal justice in Japan is the fundamental disharmony between the two heterogeneous legal systems—Continental and Anglo-American—which were abruptly merged on the recommendation of the foreign legal advisers attached to the Legal Section SCAP. With respect to the law of evidence, for example, the Japanese legislature was strongly urged to adopt a considerable portion of the Anglo-American rules of evidence in the new Code of Criminal Procedure of 1948. The whole body of the common-law rules of evidence was not adopted in the course of codification; some of the significant exceptions to the exclusionary rules were dropped, presumably with the somewhat optimistic but misguided intention of foreign advisers "leaving large areas of elasticity for implementary court decision". (I quote an American lawyer who was a member of the Legal Section of GHQ, SCAP.) The codification was carried out by a special co-operative drafting conference consisting of American and Japanese representatives, who were all experienced lawyers. There is no evidence whatsoever of any wilful attempt to impose or press Anglo-American patterns upon the Japanese system, which had been based on Continental law. On the contrary, those of the American representatives who had had comparative law training seem to have "recognized very clearly that Anglo-American concepts of evidence were totally different from those of Continental countries" and wished to avoid any attempt to blend the two. At least they seem to have "tried to combine the best features of both systems within the framework of the new Constitution" of Japan.

Unfortunately, however, their knowledge of Continental law was very limited and fell short of the dynamic knowledge of comparative law which was needed for that ambitious work of codification. Moreover, the tremendous pressure of time and the imperatives of military policy hampered free action; and the result was "a type of

emergency codification of the American law of evidence which certainly left much to be desired", despite every possible consideration "given to harmonizing the American rules of evidence with the Continental traditions".

I regret that space does not permit me to comment on all of the disharmonies and deficiencies that stem from the abrupt superimposition of Anglo-American devices upon the Continental background. I shall enumerate the principal problems with which the present system of criminal justice in Japan is confronted.

First, our new system adopted the Anglo-American style of exclusionary rules which had been developed under the Anglo-American jury system. These rules sometimes turn out to be too rigid for the juryless Japanese court system in which the sole trier of facts is a professionally trained judge or group of judges.

Secondly, the Anglo-American style of procedural rules which has been introduced into our new code does not harmonize with our substantive criminal law, which is based in its entirety on Continental tradition and consequently presupposes the Continental style of procedural law. The draftsmen of our new code should have paid much more attention to this point. At least they should have introduced into the new code, among other things, devices to facilitate the use of presumptive or circumstantial evidence.

Thirdly, Anglo-American devices for guaranties of human rights abruptly imposed upon the Continental background have caused some awkwardness in the administration of criminal justice. As an example of the defects

caused by such radical changes, I shall take up one instance. Under present Japanese law, a defendant is incompetent as a witness. This means that he cannot be sworn as a witness even though he may be willing. He may of course testify without taking an oath if he does so voluntarily; but since he is not sworn, he may withhold information or make a false statement without risking perjury. Thus he enjoys an absolute privilege, and can refuse to answer the questions propounded by the prosecution or by the judge with regard to ambiguous points contained in his statement. Such a peculiar status of law transforms the privilege against self-incrimination into a privilege of silence or even a privilege of false statement. Unquestionably this impairs the spirit of impartial justice.

VII. Conclusion

War has blind and demonic power which tends to disrupt the normal flow of human endeavor. War, however, also functions as a cultural catalyzer which brings about the interaction and blending of heterogeneous civilizations. It was under such an impetus that socio-legal reforms came into being in the postwar Japan under the military occupation. As had generally been the case in Japan's history, the revolutionary change of the politico-legal structure in the postwar years was accelerated by stimulus from the outside. The occupation authorities dictated a series of drastic socio-legal reforms without giving due importance to the cultural and historical background of Japanese society. As a result, the reform measures introduced for the democratization of Japan resulted

in the enactment of the Japanese Code of Criminal Procedure of 1948 with its unforeseen defects.

One of the problems of the social sciences is the difficulty of attaining an experimental approach. Natural scientists can easily produce similar phenomena repeatedly by artificially controlling their laboratory conditions, whereas in the field of social science even the most absolute tyrants are incapable of creating social conditions for experimental purposes. War, however, sometimes haphazardly creates some unusual opportunities. In our case, for instance, it made possible an experiment for amalgamating two heterogeneous legal traditions, through the new Code of Criminal Procedure.

Our experience in the postwar law reform taught us the invaluable lesson that abstract studies of comparative law sometimes are worse than useless. As Professor Roscoe Pound has wisely said, comparative law study should not be a mere "tonorial technicality" by which hair styles are mechanically imitated without regard to individual characteristics. To make comparative law a real science, one must have some insight into the dynamic relationship between law and national tradition. It is not my intention to blame the authors of our new procedural code; on the contrary, we appreciate the introduction of the Anglo-American legal philosophy into Japanese jurisprudence. It is my desire, however, to share our postwar experience in legal reform with those of my fellow lawyers who are interested in the development of comparative studies of laws. I shall be happy if I have succeeded in some degree in this instance.

Hybrid Methods of Reconstructing Income in Criminal Tax Fraud Cases

Mr. Schmidt points out that the Government has several methods of determining a taxpayer's income when it has no direct evidence that he has understated it. The author discusses each of these methods in turn and shows how they are used to prove tax fraud.

by Robert M. Schmidt • of the Michigan Bar (Detroit)

ATTORNEYS ENGAGED in the handling of a criminal tax fraud case will usually discover that the reconstruction of a taxpayer's income is accomplished by methods which markedly differ from the manner in which a tax return is prepared. The methods used by the Government are quite distinct from traditional double entry bookkeeping and from the methods of accounting commonly used by the taxpayer. This is because the Government is not required to establish understated income in criminal tax fraud cases by the same processes and formalities which a taxpayer is required to observe in making his return. The existence of unreported income may be proved by any practical method available in the circumstances of the particular case. The Government is free to use all proper evidence available, whether circumstantial or testimonial, because the Supreme Court has stated there is no intrinsic difference in either type of proof when measured against the standard of its effectiveness to overcome reasonable doubt. This latitude is allowed because tax fraud engrosses a field as broad as the wildest taxpayer's imagination can conceive to defeat his taxes.

The Traditional Theories of Proof

The theories of proof utilized by the Government are divided between direct

evidence and circumstantial evidence theories. In direct evidence cases, called specific item cases, the Government adduces proof of specific items of income omitted from the tax return, specific false deductions claimed on the return or false exemptions claimed on the return. The Government will present this direct evidence whenever it is possible to obtain it. This approach remains true even though the primary evidence is circumstantial, thereby resulting in a combination of proof. Where direct evidence is unavailable or is insufficient to reconstruct the fraud on the revenues, the courts have sanctioned the use of theories utilizing circumstantial evidence as necessary and appropriate means of bringing tax evaders to justice. The circumstantial evidence theories include the net worth method, the expenditures method, a combination of the two called the net worth-expenditures method, the bank deposits method, and the percentage mark-up method. The basic theory underlying these methods, with the exception of the percentage mark-up method, is that evidence of unexplained funds or property in the hands of a taxpayer establishes a *prima facie* case of understated income and it is then incumbent upon the taxpayer to overcome the logical inferences to be drawn from the facts proved. These theories emphasize the accumulation or disposition of funds representing tax-

able income rather than the source of the receipt of the funds.

The net worth method and the net worth-expenditures method present and emphasize a year-end financial picture showing expenditures of a capital nature reflecting increased tangible assets which must have been derived from income, from prior accumulations, or from non-income acquisitions. In the expenditures method the primary emphasis is upon the taxpayer's expenditures without regard to whether they increased the visible net worth of the taxpayer. It is the addition of personal living expenses and other expenditures that do not increase the visible net worth of the taxpayer that technically distinguishes the net worth-expenditures method from the net worth method, but common parlance among tax practitioners equates the two theories under the nomenclature of the net worth method.

There is no single exclusive method of proving the receipt of unreported income by tracing the expenditure of money within the framework of the traditional concept of the expenditures, the net worth or the net worth-expenditures method. The essence of these theories is that cash expenditures by a taxpayer in any year in question which exceed all his known cash resources plus his reported income may give rise to the inference that he has in fact received more income than he has re-

ported. Under the common definition of the net worth-expenditures method by the Supreme Court in *Holland v. United States*, 348 U.S. 121 (1954), the Government first establishes an "opening net worth" or "starting point" which consists of the total net value (adjusted basis for tax purposes) of the taxpayer's assets at the beginning of a given year. The Government then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's nondeductible expenditures, including living expenses, are then added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims that the excess represents unreported taxable income. The assumption of this definition is that all of a taxpayer's income for a year is either expended during the year or is reflected in assets on hand at the end of the year. This method is a derivation from single entry bookkeeping.

The reconstruction of income under the bank deposits method requires a showing that a taxpayer is in a business of a lucrative nature and proof of periodic deposits to his bank account or accounts. These deposits are then analyzed to eliminate non-income items such as gifts, loans, redeposits, duplications, bank transfers and amounts earned in pre-prosecution years to determine receipts which, after the allowance of deductions, constitute taxable income. Just as the addition of personal living expenses to tangible net worth increases has resulted in what is called the net worth-expenditures method, the addition of expenditures resulting from undeposited currency to funds deposited in the bank produces a computation that is called the bank deposit-expenditures method. There must be a careful tracing of funds to prevent a duplication of items caused, for example, by expenditures from funds obtained from checks written to cash.

The percentage mark-up method is not sanctioned as a prime theory of proof in criminal tax cases. Neverthe-

less, this method is occasionally used in combination with other theories of proof to establish a source of income or corroborate the understatement of income determined under another theory of proof. The essence of this theory is that there is a percentage mark-up or gross margin of profit which is common to items sold in a particular business. Once either sales or cost of goods sold is known, it is possible to make a calculation of income derived from the use of these percentages or ratios considered typical in the business under consideration.

The concurrent use of various theories of proof has been sanctioned in numerous cases. The litigated cases reveal such combinations as: (1) net worth, expenditures and bank deposit proof, (2) net worth and bank deposit proof, (3) net worth and expenditures proof where one computation has emphasized the flow of funds and the other has emphasized the tangible net worth increases as a result of the expenditures, (4) bank deposits and specific item proof, and (5) net worth and specific item proof.

Different theories of proof have also been used in consecutive years in proving understated income over a span of years. The litigated cases, for example, illustrate: (1) bank deposit proof for two years and net worth proof in the earlier years and as corroboration of the bank deposit proof, (2) specific item proof in two years and net worth proof for one later year and to corroborate the specific item computations, and (3) bank deposit proof for earlier years and then specific item proof for the remainder. While as a matter of theory there should be no doubling up of income in any one year, it is necessary to watch carefully for errors in the practical application of the theories.

The Hybrid Theories of Proof

In addition to the uses of the various theories of proof discussed above, there has been an increasing breakdown in the traditional theory of proof categories. The substance of this more recent approach is the utilization of portions of more than one of the established theories of proof with no fulfillment of the evidentiary requirements



John Henderson Studio

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common to the use of the theory if used as the sole or prime theory of proof. For lack of any other nomenclature, this utilization of portions of several theories of proof may be called the use of hybrid theories of proof.

The case of *United States v. Nunan*, 236 F. 2d 576 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957), is one of several recent examples of a reconstruction of income outside the traditional framework of any one particular theory of proof. The appellate court reviewing the conviction chastized the attempted categorization of the proof of income into one of the labels or categories of proof recognized by the appellate opinions of recent vintage in tax evasion cases. The income was reconstructed by the Government under a theory of proof utilizing bank deposits, expenditures and specific item evidence none of which would have established the income picture alone. All deposits to the bank accounts of the taxpayer and his wife were analyzed to determine an amount representing current income. To this amount were added all traceable specific items of income which had not been de-

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posited to any bank account. Then to this total were added all cash expenditures which were not accounted for by either the deposited or the non-deposited current income. The true role of the circumstantial evidence is obscure because the reviewing court believed that the proof of the specific items was sufficient to support the conviction. The important point for present purposes is the utilization of evidence pertaining to portions of three different theories of proof without a full reconstruction of income under any single theory.

Persuasive authority for a flexible approach to income reconstruction is found in the United States Supreme Court decision in *United States v. Calderon*, 348 U.S. 160 (1954). This was a net worth prosecution in which there was insufficient evidence in corroboration of an admission as to cash on hand to establish the understatement of income by the net worth method. The Supreme Court then searched the record for independent evidence which tended to establish the crime of tax evasion directly without resort to the net worth method. The evidentiary strands sufficient to establish the gist of the evasion offense consisted of an increase in the defendant's visible assets at a time when he was receiving un-

recorded amounts of income. These unrecorded amounts of income were not specific items of unreported income. Rather, this conclusion was drawn from evidence that some of the receipt books from the taxpayer's coin operated machine business were lost or misplaced.

These brief illustrations are sufficient to indicate that courts are not interested in ritualistic formulae whereby income must be determined only by meeting the requisite standards of any particular pattern. The true test is whether the evidence is of probative value in establishing taxable income. If the evidence viewed in panorama meets this test it will serve the purpose of proving the gist of the income tax evasion offense. While these so-called hybrid theories of proof may be developing, there still remains the judicial limitation that there cannot be a duplication of items presenting an appearance of taxable income that is not in reality a true representation of the taxpayer's income. In the expenditures case of *United States v. Caserta*, 199 F. 2d 905 (3d Cir. 1952), for example, it was error for the Government to utilize both cash expenditures and cash withdrawals from a bank account without a showing that the cash withdrawals were not used for cash purchases. Thus

while courts are prone to recognize new theories of proof to protect the revenues, they are equally as protective of individual rights prejudiced by an application of an unsound reconstruction of income.

The present trend is away from the traditional or classical theories of proof as the criminal sanctions of the Internal Revenue Code are applied to persons in all walks of life. While judicial policy which is protective of the revenue bloodstream may sanction these hybrid theories, there are equally cogent considerations militating against an unguarded expansion of the theories when the potential danger to individual rights is recognized. Whereas certain minimal criteria must be met in proving income under established theories of proof, there is the ever-present danger that taxpayer-defendants may not be afforded the benefit of equal standards in the uncharted area of the hybrid theories. The investigating agents of the Internal Revenue Service are very adept in devising new theories of proof as income affecting transactions are presented in the varying contexts of business and the professions. It is only with a zealous effort by members of the Bar that the liberty of taxpayer-defendants will be protected.

A Seminar on Business Planning and Professional Responsibility

The American Bar Association's Standing Committee on Continuing Education of the Bar, under the chairmanship of Churchill Rodgers, of New York, is sponsoring a seminar on business planning and professional responsibility which will be held at the 1961 Annual Meeting of the Association. The seminar will take place at the Statler Hotel in St. Louis on Sunday, August 6, at 2:00 P.M.

The seminar will be the same as that to be offered this summer in Cambridge by members of the Harvard Law School faculty, and the persons participating in the St. Louis program will be the same as those participating in the earlier program at Cambridge.

Professor Robert Braucher of the Harvard Law School will be the chairman and other participants will be David R. Herwitz of the Harvard Law School, Norris Darrell, President of the American Law Institute, and Ross L. Malone, former President of the American Bar Association.

The seminar will be presented under the auspices of the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, Harrison Tweed, of New York, Chairman.

African Conference on the Rule of Law

Held at Lagos, Nigeria, in January

The International Commission of Jurists,¹ which sponsored the African Conference in Lagos, Nigeria, is a voluntary, non-political organization of lawyers from many countries. Its purpose is to spread the doctrine of the rule of law and to spotlight major abuses of human rights wherever they may occur. The Commission has consultative status with the Economic and Social Council of the United Nations.

There are at present twenty-six national sections of the Commission functioning in twenty-six countries, with a secretariat located in Geneva, Switzerland. The work of the Commission is usually financed by individuals and by foundations. The American Fund for Free Jurists, Inc., of which Whitney North Seymour is a Vice President and Director, is its chief supporting agency in the United States.

American Bar Association members may be interested in the Lagos Conference since Vivian Bose, distinguished President of the International Commission of Jurists and former Justice of The Supreme Court of India, will be a principal speaker at the Association's Annual Meeting in St. Louis in August.

by Laurence M. Lombard • of the Massachusetts Bar (Boston)

WITH THE emergence into independence of seventeen African countries during 1960, the Nigerian Section of the International Commission of Jurists invited the Commission to sponsor a Conference at Lagos, Nigeria, to discuss human rights and the rule of law with particular attention to Africa south of the Sahara. The Conference was held during the first week of January, 1961, and was financed by grants of \$54,000 from the Ford Foundation and £10,000 from the Nigerian Government.

The Commission has defined the term *rule of law* to mean:

The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual

from arbitrary government and to enable him to enjoy the dignity of man.

Since the Conference was to be primarily African, the Commission wisely decided to limit the number of delegates from outside Africa. The 194 jurists who attended came from thirty-four different countries, twenty-three of which were African including eleven of the seventeen which had newly gained their independence. No lawyers from the African countries bordering on the Mediterranean were invited. Of the 194 jurists, approximately one hundred were delegates, the rest being observers like myself, with the great majority of the observers being Nigerian. Both the delegates and the observers attended as individuals and not as representatives of their respective countries.

Lawyers were present from practically all the former English and French

African colonies, with the exception of Guinea. Although three lawyers from this former French colony were invited, at the last minute they were unable to obtain passports from the autocratic government of Sékou Touré. No independent lawyers could be found in the Portuguese colonies of Angola and Mozambique, and the only three from the various sections of the Congo were three Congolese law students now studying at the University of Lovanium School of Law outside Leopoldville.

Three delegates came from France, the United Kingdom and the United States, and one each from Canada, Denmark and Germany. The three delegates from the United Kingdom are well known to many American lawyers. They were Sir Patrick Devlin, Judge of the Court of Appeal; Norman

1. A detailed description of The International Commission of Jurists appeared in 41 A.B.A.J. 417 (May, 1955) and 43 A.B.A.J. 924 (October, 1957).

Marsh, the former Secretary General of the International Commission of Jurists and a former Fellow of the University College of Oxford; and Gerald A. Gardiner, a leading barrister and a former Chairman of the General Council of the Bar of England and Wales.

The three delegates from the United States were Robert Bowie, Professor of International Studies at Harvard University and former Assistant Secretary of State for Policy Planning; Eli Whitney Debevoise, practicing lawyer in New York City and former General Counsel of the Office of the United States High Commission for Germany; and Judge William H. Hastie of the United States Court of Appeals for the Third Circuit, former Dean of Howard University School of Law, former Governor of the Virgin Islands and Assistant Secretary of War under Mr. Stimson. The observers from the United States were: Thomas M. Franck, New York University Law School, observer for the International Law Association; Professor Fowler Harper, Yale University; Professor William B. Harvey, University of Michigan; Laurence M. Lombard, observer for the International Bar Association; Randolph Marshall, Research Fellow; Charles S. Rhyne, observer for the American Bar Association; and Professor Louis B. Schwartz, University of Pennsylvania.

From the angle of legal distinction, the participants included nine chief justices, thirteen judges,² five attorneys general, seven ministers of justice and nine law professors.

The Opening Session

The opening session of the Conference was held in the National Hall, a handsome modern building finished on the inside in indigo blue and native mahogany. English and French were the official languages and simultaneous translations over earphones were provided. The Chief Justice of the Federation of Nigeria, Sir Adetokunbo Ademola³ called the Conference to order, a big fine-looking man—friendly, poised and humorous. Sir Adetokunbo pointed out the appropriateness of holding the Conference in Nigeria, not merely because of her size and population (38,000,000 people) and her adherence

to the rule of law, but "because she could boast of more indigenous lawyers than the rest of the countries in Africa put together".

The popular Prime Minister of Nigeria, Alhaji Sir Abubakar Tafawa Balewa, wearing white Moslem robes and hat, gave the inaugural address. Although Sir Abubakar spent only one year studying in England, he graciously welcomed the lawyers in beautiful English, fully living up to his nickname, "The Golden Voice". He suggested as the starting point of the Conference the three principles of Justinian—"That we should live honestly, should hurt nobody and should render to every man his due." He also pointed out that in the recent Nigerian Constitution a special chapter is devoted to human rights, which are "entrenched" so that they can only be modified by a two-thirds vote of both houses of the Federal Legislature following the consent of both legislative houses of two of the three regions into which Nigeria is divided.

In closing he warned the delegates that the subject of the Conference was very close to his heart, that he intended "to study very carefully every word which is spoken" and he reserved the right to return and talk to them again. "We who find ourselves in positions of authority have a responsibility to preserve law and order and at the same time to guard the laws of eternal justice even while we are being guided by them—and how difficult it can be in practice as opposed to theory."

Chief Prest, the Chairman of the Nigerian Section of the International Commission, surprised some of us by saying the African colonies were ever grateful to their former colonial rulers for their tolerance and assistance. However, he said the rule of law was lacking when one's right of movement was dependent on the color of one's skin "as it is in some African countries". He spoke of the courageous action of the Chief Justice of Southern Rhodesia in resigning his position in protest against the restrictive legislation recently passed in that country.

Vivian Bose, President of the International Commission and former Justice of the Supreme Court of India, stressed that the purpose of the Confer-

ence was not for lawyers from other countries to tell the African lawyers what to do but rather to share experience and learn together—for lawyers within and without Africa to get to know one another and to exchange ideas—"so that persons less fortunate than we can have more of the decent things of life, so that we, you and I, can go everywhere with dignity and not be imposed on because of our race, color or religion".

Mr. Bose set the standard for the committees when he asked that opinions at the Conference be expressed without restraint except for courtesy and consideration for others—and with an understanding that each country must work out its own system.

The several talks at the opening session were stimulating and concise. In the afternoon, the Conference broke up into three Committees of about thirty-five delegates, each with a Chairman, a Vice Chairman, a Reporter and a Secretary coming from a different African country.

The broad subject for discussion, "Government Action, State Security and Human Rights", had been divided in advance among three committees: the first dealing with the power of the legislative, executive and judicial branches with reference to human rights, the second with the criminal law aspects of human rights and the third with the responsibility of the judiciary and the Bar for the protection of these rights.

As an observer, I was free to move about from one committee to another and so had an opportunity to see the delegates of each committee in action when particularly controversial points were being discussed. The committee discussions, which continued for three days, were outspoken, but friendly.

In Committee No. I, it early became apparent how vital the subjects of discussion were to the participants. Kwabu Boateng, the young Minister of Information of Ghana, arose in his brilliant red, green, yellow and purple robe of Kente cloth to say that Ghana, which

2. Since the Conference, Mr. Israel Maisels, a Delegate to the Conference and leading Defense Counsel in the recent treason trials in Southern Rhodesia, has been appointed to the Bench of the High Court of Southern Rhodesia.

3. Sir Adetokunbo Ademola is one of twenty-four members of the International Commission of Jurists.

had gained her independence a year ago, had early found that the Constitution she had obtained from England was inadequate and that Ghana had adopted her own new Constitution which seemed to be working. He suggested that Nigeria might follow Ghana's example.

In fact, Ghana under Nkrumah has been moving rapidly toward a dictatorship. A Nigerian lawyer in colorful Yoruba dress and cap was quick to rise to his feet and tell the Ghanaian Minister of Information that he need not worry about Nigeria. "Some principles of law are English", he said, "and some are universal. The lawyers of Nigeria regard the right to be heard and the right of opposition as universal."

The White Settler Problem

The European-settler situation in the southern nations of Africa came in for strong criticism. An African lawyer from Southern Rhodesia, John C. Shoniwa, outlined the abuses in his country, saying that since the European settlers were granted self-government by the Crown in 1923 "democratic forms have been adapted to reinforce one of the most ingeniously devised dictatorships of this century". Although the two and a half million blacks outnumber the whites more than ten to one, there is not a single indigenous African in the Southern Rhodesia Legislature. "If the claim to teach Africans the virtues of the democratic system held any truth, there would at least be some Africans in the Assembly."³

Although the professed interest of the government is to educate the Africans, Mr. Shoniwa pointed out that in 1960 the federal government spent £30,000,000 on European education compared with £2,000,000 on African education. As one of the major sources of unrest he referred to the Land Apportionment Act of 1930 under which the African population was assigned 42 million acres of land as against 48 million for the much smaller European population.

In conclusion, he cited the recent report of the Devlin Commission sent out from England to investigate conditions in Nyasaland, as confirming "in

no uncertain terms that the African in Southern Rhodesia is treated . . . as a third-rate citizen in the land of his own birth". The fact that Sir Patrick Devlin was sitting as a delegate in Committee No. III gave added strength to this reference.

Julian Greenfield, the white Minister of Law of the Federation of Rhodesia and Nyasaland, appeared to receive scant support when he attempted to defend the progress the Federation is making toward racial justice.

In Committee No. II, there was much discussion of the Preventive Detention Acts which are in force in many African states. Generally, as in Ghana, the Executive can place a person in detention for five years with the right to a three-year extension if, in his opinion, the person is engaged in activities which might lead to disorder or are prejudicial to the security of the state. No proclamation of a public emergency is required. In Ghana there is no court or other review of the basis of the detention and no financial provision is made for the family of a prisoner during detention, as is the case in India. In Southern Rhodesia, as in India and some other countries, provision is made for a review tribunal which must report the facts to the Executive or Parliament although there is no requirement that any recommendation of the review tribunal be followed.

That the subject matter of Committee No. II was close to the hearts of many members of the committee will be apparent from a look at its membership. The chairman of the committee, Kwame Bentsi-Enchill, was a Ghanaian barrister called to the Bar in London, who later became a law school teacher and is now doing graduate study at Harvard Law School; the Reporter was a practicing attorney and member of the Legislature in Togo, where as yet there is no Constitution and where the Executive imprisons people without the sanction of law and without the possibility of court review; the secretary of the committee was from Kenya, where until a few months ago people were being detained without trial; three other members of the committee were from Ghana, including Mr. Danquah, who



Laurence M. Lombard practices law in Boston. He is a graduate of Harvard College and Harvard Law School, class of 1921. During the Second World War he served as Assistant General Counsel and later as General Counsel of the War Production Board.

preceded even Mr. Nkrumah in coming out for nationalism in Ghana, but is now recognized only as the brave leader of the fast dwindling opposition. One of the most articulate members was a European lawyer, who, having spent some forty years of his life in South Africa, to avoid the racial discriminations of that country moved his family to Southern Rhodesia and began the practice of law anew. Recently, he had been the prime mover in getting the Southern Rhodesia Bar to publicize a very strong statement opposing their Preventive Detention Act, with the result that the act was somewhat softened and a form of review provided. The deep concern of such men over unlimited restraints on individual freedom is obvious.

Courage and integrity were displayed in the discussions of Committee No. II when a Nigerian lawyer suggested that there might be some rare cases where preventive detention was desirable and that it might be going too far for the Commission to recommend against it

3. Since the Conference, a number of Africans have been admitted to the Southern Rhodesia Legislature.

absolutely. Quickly, Koi Larbi, a rugged barrister from Ghana, spoke up, "You in Nigeria don't know what you are talking about. We have preventive detention in our country and there can be no exceptions under which it is proper." This was one of many examples of brave Ghanaian lawyers denouncing the policy of their authoritarian government, uncertain whether they too might be imprisoned for five years on returning to their homeland only 300 miles away. The committee agreed and recommended in its report that there should be no preventive detention except in time of war or other properly declared public emergency.

Judicial Independence

Committee No. III readily agreed on the importance of the absolute independence of the judiciary. Where a system has been working successfully for years, it should not be changed. But in newly developing systems and in countries where the independence of the Judiciary is not fully secured the committee recommended that judges should be appointed and removed by an independent organization such as the Judicial Service Commission of Nigeria rather than by the Executive or Legislature.

While the Conference concentrated on the rights of the individual as against the state, in a lighter vein the interests of the state were not overlooked in the deliberations of Committee No. III. On the subject of retroactive legislation the Attorney General of the Sudan brought a laugh when he described a case in which the estate of a rich deceased had completely escaped death taxes in his country. Death duties had always been collected as an administrative fee although not specifically authorized by statute. In 1954 a new tax law recited that no taxes not covered by the new law could be collected, but the Legislature forgot to list the death duties in the new law. The executor of the rich estate refused to pay the tax and the Supreme Court upheld him. Thereupon, several estates which had previously had to pay the duties sued to recover. As the attorney general said they had to rush through

legislation "which was generally popular" to save the Sudan from paying back all this money.

In spite of this plea the committee recommended against permitting retroactive legislation—particularly in criminal cases—thereby following the precedent of the United States constitutional provision against *ex post facto* laws.

The conclusions of each committee were set forth in separate statements read, revised and adopted by the entire Conference in a final plenary session. A resolution known as the Law of Lagos was adopted declaring that in any society the obligation of the rule of law cannot be fully realized unless legislative bodies have been established in accordance with a freely adopted constitution; "that all governments adhere to the principle of democratic representation in their Legislature and that the right to personal liberty should be written into the Constitution and that personal liberty should not be restricted without trial in a court of law". The Conference invited all African governments to study the possibility of adopting an African Convention of Human Rights in such a manner that its conclusions would be safeguarded by an African court of competent jurisdiction. Finally, to promote the principles of the rule of law it called on the judges, practicing lawyers and teachers of law in African countries to establish national sections of the International Commission of Jurists.

At the New Delhi Conference two years before, considerable emphasis was placed on the importance of creating social, economic, educational and cultural conditions under which the aspirations and dignity of an individual may be realized on the theory that the rule of law is meaningless unless the essentials of a certain standard of living are assured. At the Lagos Conference minimum living standards were taken more as a matter of course. The subjects of greatest importance to the African delegates were freedom of movement and the protection of the individual from imprisonment without trial under the guise of preventive detention.

The most moving speech of the Con-

ference was made by President Bose, at the final plenary session—

And now I want to address a word to our African brothers and to speak on a personal plane. I feel with you the hurt and indignities and humiliations that would be our lot and the lot of our children in some quarters of the globe because I am one of you and would suffer with you because of the colour of my skin and my racial origins but I realize that our deepest interests do not lie in a flamboyant outburst of our feelings that can only tend to embarrass and alienate our friends. They lie in a cold, sober and dignified appraisal of facts, by impartial outside judges and observers; and most of the facts cannot be controverted and shame and stir the conscience of right thinking men. I thank you for having acted with dignity and restraint and for having refrained from taking the cheap and easy way that would have gained you the plaudits of the crowd but which, in the long run, would have made you lose your case—your case and my case—for we both sail in the same boat. There are many like myself, bound by the unwritten restraint of high judicial office, and others for other reasons, who are working hard for your cause and mine but who would not be able to associate themselves with this great organization if it turned itself into a political platform for the airing of grievances. That would kill our organization and that would be a thousand pities.

The Conference received excellent coverage in the three newspapers published in Lagos, with large headlines, photographs and front-page stories every day.

On the third day of the Conference, *The Daily Express* under the headline, "Smuggled Letter from Ghana Detention Camp", published in full a signed letter calling on the International Commission to speak up against the hypocrisy of African governments detaining their own citizens without trial and at the same time criticizing "imperialist" governments for their conduct.

There has been a wave of indignation throughout the African Continent against the arrest and detention of M. Patrice Lumumba by the Congolese Government.

This is strange and unbelievable, especially in Ghana, where for over two years the same Government that has been loudest in the condemnation of President Kasavubu's action has

detained over 90 members⁴ (including MPs) of the opposition party, without trial, on framed up charges. . .

Is there anything more dishonest than this duplicity? And Nkrumah has the cheek to shout at the top of his voice that Ghana is more democratic than any other government on Earth!

Nigerian newspapers like their American counterparts attempt to cover the news of the world and in so doing seemed fair. Although racial discrimination in the United States was not mentioned at the Conference, the newspapers carried factual accounts of the white riots and the suspension of two Georgia University students "for their own protection". The insult to the Nigerian diplomat who was refused breakfast in a Virginia restaurant and Secretary Herter's apology were prominently reported.

Every jurist with whom I talked felt that the Conference had been a great

success. Previously, the lawyers of the former English colonies had had contacts largely with England, and lawyers of the French-speaking colonies largely with France. This was the first time that most of the English-speaking and French-speaking lawyers had met together. Not only were they very favorably impressed by one another, but they also found out how similar were their views on fundamental law. A number of the Ghanaian lawyers spoke of the value of knowing that the jurists of the world are behind them in their struggle for the protection of human rights. The warm hospitality of our Nigerian hosts fostered friendships between Africans from various parts of the continent as well as between Africans and non-Africans.

Ever more frequently, one reads of the hope for world peace under law. Certainly, this is desirable. Generally,

some form of government or agreement to which nations will become parties is contemplated. In this world of distrust such an approach through nations of conflicting ideologies seems remote.

The more modest approach of the International Commission of Jurists, working through lawyers within nations and using the force of public opinion to promote the dignity and safety of the individual, appears to be a promising stepping stone towards the millennium of peace through law. As Vivian Bose said in addressing the Conference, "When individuals within a nation learn to live in concord with one another, then there is hope that nations of the world will learn to live in peace among themselves, and the rule of law will replace the rule of the jungle."

4. A few days later the Chief Justice of Ghana told me he understood there were now 258 under detention.

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The Judicial Conference Handbook on Procedures for the Trial of Protracted Cases

Mr. McAllister reviews the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, which consists of the report of a study by the Judicial Conference of the United States headed by Judge Murrah, of Oklahoma. The report is important, not only because of its subject matter and its recommendations, but also because it represents a new approach to solving problems of judicial administration.

by Breck P. McAllister • of the New York Bar (New York City)

THE HANDBOOK IS, as its title states, a handbook of recommended procedures for the trial of protracted cases. It consists of the Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, under the chairmanship of Chief Judge Alfred P. Murrah, adopted by the Judicial Conference of the United States in March, 1960.¹

Five main points are stated to be the basic steps suggested for solving the problem presented by these cases: (1) early identification of the big case, (2) its assignment to one judge for all purposes and his prompt assumption of control, (3) the definition of the issues to be tried, (4) the confinement of discovery within the boundaries of the defined issues and discovery rules and (5) the planning of trial procedures and the full utilization of tested trial techniques.²

The *Handbook* is essentially a review of the points made in the Prettyman Report of 1951³ on the same subject, a finding that those points are valid, the development of a number of new and significant ones, a series of recommendations designed to refine and implement them and a full discussion of the experience and reasons that support the recommendations. The text is a distillation of earlier reports and studies as well as of proceedings

at three seminars at each of which Bench and Bar met together full time for a week and exchanged and debated experience, ideas and suggestions with vigor, candor and imagination. The whole was put in its final form through further collaborative effort.

The collaboration between Bench and Bar that produced the *Handbook* is in many respects unique in American legal history. The problem of judicial administration of the big case has received attention for about ten years. The Prettyman Report of 1951 recommended neither legislation nor amendments to the rules. It set forth instead "an authoritative statement of the importance of the problem . . . and a description of remedial methods and measures thought by experienced judges to be effective".⁴ The Section of Antitrust Law of the American Bar Association followed with the views and experience of the antitrust trial Bar in a comprehensive Section report in 1954.⁵ This was not only a critique of the Prettyman Report but also a compendium of trial experiences in cases of this sort. In 1955, the Judicial Conference appointed a Study Group on Protracted Litigation under the chairmanship of Chief Judge Alfred P. Murrah "not to go behind or duplicate the Prettyman Report, but to translate it into courtroom action".⁶ This was

followed in 1958 by a second report of the Antitrust Law Section. This was prepared at the suggestion of the Judicial Conference Committee and, when completed, reflected the thinking of some sixty antitrust practitioners both on the defense and prosecuting side. This, the so-called Streamlining Report,⁷ was closely reviewed by the Judicial Conference Committee and played an important part in the steps that followed.

Constant collaboration between experienced judges and experienced lawyers took place from the outset. The initial impulse came from the guide lines of the procedural outline prepared by Chief Judge William E. Stecker, and it was also under his active chairmanship that the hard work of drafting was carried on and completed. The result is the *Handbook* which is so

1. HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351-475, hereinafter cited as HANDBOOK.

2. HANDBOOK, 25 F.R.D. 373-374.

3. Report of the Judicial Conference on Procedure in Antitrust and Other Protracted Cases dated September 26, 1951, 13 F.R.D. 62.

4. *Id.* at 64.

5. Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases, Section of Antitrust Law, American Bar Association, dated May 1, 1954.

6. PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES, NEW YORK UNIVERSITY LAW CENTER, AUGUST 26-30, 1957, 21 F.R.D. 395, 402, hereinafter cited as N.Y.U. SEMINAR.

7. "Streamlining the Big Case", Report of the Special Committee of the Section of Antitrust Law of the American Bar Association, September 13, 1958, 13 A.B.A. ANTITRUST SECTION REPORTS 183.

aply described by Judge Prettyman as "a compendium of suggestions from the experienced to the experienced".⁸ Chief Justice Warren, in announcing completion of the *Handbook*, declared that it "ranks as an accomplishment with the Federal Rules of Civil Procedure" and added that, while its recommendations dealt with the big case, "one cannot fail to see their practical utility in the conduct of everyday litigation".⁹

It is plain enough that henceforth the *Handbook* will be required reading for both court and counsel at the outset of one of these cases. In addition, the publication of the proceedings at the 1957 and 1958 seminars has made available many fascinating items of experience and exchanges of views. To mention only a few, there are the candid exchanges between Chief Judge Clark and Judge Dawson on the place of pleading in defining issues,¹⁰ the dramatic story told by Judge Campbell and counsel as to how the *A & P Woman's Day* case was submitted to the court after a trial of thirty minutes, eight months after the complaint was filed,¹¹ Judge Ridge's discussion of the functions of the first pretrial conference,¹² Judge Fee's views on pretrial procedures¹³ and Judge Irving Kaufman's success with pretrial, in two large criminal conspiracy trials.¹⁴ A multitude of other bits will reward the browser. Special mention goes to Bruce Bromley's recitals of his experience as a protractor and expeditor of cases.¹⁵ This is the story of the work of a great advocate told with wit and charm. Its lessons are unmistakable.

In the reports of these seminars will be found frank discussions of successes and failures of procedures in particular cases. The variety of techniques used by different judges and counsel shows how unimportant specific rules may be and how important practice and experience are within the corners of a broad rule such as, for example, Rule 16 on pretrial. The know-how that is found in these reports of the seminars as well as in the *Handbook* itself, the earlier Prettyman Report and the American Bar Association reports seldom finds its way into reports of decisions. It is to be found in these documents in abundance.

The results of this kind of collaboration between Bench and Bar are so striking that it is to be hoped the example will be followed in other similar efforts to improve the administration of justice.

The Recommendations of the Handbook

Turning now to the recommendations of the *Handbook*, we have selected a number for special comment.

The one problem that has plagued these cases more than any other is the accommodation, on the one hand, of the generalities of modern issue pleading¹⁶ and the use by the parties of the arsenal of available discovery procedures with, on the other hand, the necessity for the particularization of the issues of fact that are to be tried and of law that are to be decided. As it was so tersely put at the Stanford Seminar, "Until there is an issue, there is nothing to try."¹⁷

The problem is minimized if manageable issues are presented in the pleadings. Discovery may be held within the bounds so fixed and if further particularization becomes desirable at the close of discovery it can be settled in a pretrial order. The *Handbook* follows the Prettyman Report and earlier studies in treating pleadings as inadequate to pose issues that are even sufficient to fix the boundaries of discovery much less the issues to be tried.¹⁸ This treatment of pleadings is realistic, though the necessity for it may be unfortunate. The reality is that pleadings are written by counsel and are thus under their control. The court has, of course, some powers over pleadings but they are crude and awkward. Those powers, even if exercised to the full, will scarcely produce pleadings adequate for discovery and trial unless counsel is prepared to write such pleadings. The effect of the court's

orders may do little more than prolong the literary exchanges of the parties. A genuine advance of the proceedings to a triable point may, as a practical matter, require quite different procedures.

It is unfortunate that this assumption as to the inadequacy of modern pleading must be made because, as Judge Dawson puts it in his plea for more specific pleading, "If we are to require a specification of the real issues, where is a better place to start than in the complaint itself?"¹⁹ It is to be regretted that the *Handbook* seems to put pleadings to one side with not even a nod of encouragement for more specific pleading, even though judicial sanctions to produce such pleading may be lacking or ineffective.

The *Handbook* takes an important step forward in suggesting that, if discovery is required by either party, counsel for both sides be required to submit "tentative written or oral statements" which "should serially state the ultimate facts as to each legal issue".²⁰ When this has been done, "discovery should thereafter proceed in accordance with the bounds indicated". At the close of discovery the issues to be tried are then to be crystallized in a pretrial order.²¹

Another troublesome problem has been the proliferation of discovery and proof in both scope and time. These cases are all too often overdiscovered and overtried. As to scope, the *Handbook* can do no more than insist that the issues of fact to be tried be particularized by the means suggested and that both discovery and proof be held within the bounds so fixed. However, in a civil suit seeking injunctive relief to forestall future violations the proof required is to show "a real threat of future violation or a contemporary violation of a nature likely to continue or recur".²² The emphasis here is on the

8. *HANDBOOK*, 25 F.R.D. 359.

9. 25 F.R.D. 220. Judge Murtah in the foreword to the *HANDBOOK* noted that while it was designed for use in protracted cases "One cannot escape the clear application of the principles enunciated herein to the average case" 25 F.R.D. 357.

10. Chief Judge Charles E. Clark, United States Court of Appeals for the Second Circuit, N.Y.U. SEMINAR, 21 F.R.D. 45; Archie O. Dawson, Judge of the United States District Court for the Southern District of New York at the Seminar held at the School of Law, Stanford University, August 25-30, 1958, 23 F.R.D. 430, hereinafter cited as *STANFORD SEMINAR*, and the comments of Chief Judge Clark, *id.* 435.

11. N.Y.U. SEMINAR, 21 F.R.D. 498; *STANFORD SEMINAR*, 23 F.R.D. 501.

12. N.Y.U. SEMINAR, 21 F.R.D. 406.

13. *STANFORD SEMINAR*, 23 F.R.D. 328.

14. *Id.*, 23 F.R.D. 551.

15. *Id.*, 23 F.R.D. 417.

16. Chief Judge Clark, *STANFORD SEMINAR*, 23 F.R.D. at 438.

17. Roy F. Shields, *STANFORD SEMINAR*, 23 F.R.D. at 343.

18. *HANDBOOK*, 25 F.R.D. 386-390.

19. *STANFORD SEMINAR*, 23 F.R.D. 434.

20. *HANDBOOK*, 25 F.R.D. 387.

21. *Id.*

22. *United States v. Oregon State Medical Society*, 343 U.S. 326 at 333 (1952).

present, yet all too often a vast mass of material is dredged up out of the past, often the relatively ancient past, through inadequately controlled discovery. When this mass finds its way into the trial record, the record grows in bulk though not in informative proof that illumines the present. To control such excessive proliferation or, if you like, such overdiscovery and overtrying of these cases, the *Handbook* endorses and develops with full approval earlier suggestions that the trial judge define and limit the period of proof at pretrial conference.²³ What is good enough for proof should be good enough for discovery though this point is not made in the *Handbook*.

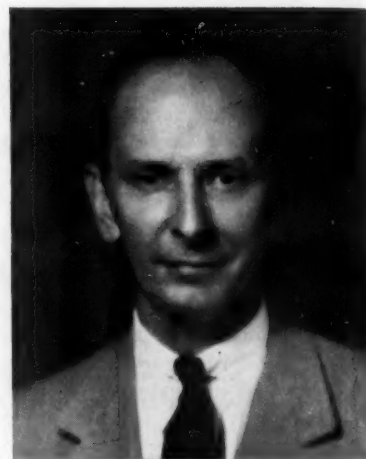
There is no purpose in the *Handbook's* recommendation to cut off proof of either party. The purpose is rather to fix a date that will permit plaintiff a "reasonable opportunity to establish a prima facie case of present violation".²⁴ If this requires the fixing of a cut-off date it need not be unqualified. However, predated evidence "may be excluded unless the offering party shall show good cause why it should be received".²⁵ It is also noted that different cut-off dates may be established for different issues and Judge Holtzoff's decision to that effect is cited with approval.²⁶ The skillful use of the techniques here suggested will do much to suppress counsel who would trace every vein of proof to its distant origin. Again, the approach here suggested would seem to have equally valid application to discovery.

Scope of Equitable Relief in Civil Cases

An important recommendation is made as to conferences on the scope of equitable relief in civil cases.²⁷ It is proposed that after discovery has been substantially completed pretrial conferences should be devoted to the question of the relief sought by the Government. It is pointed out that frank discussion of the Government's objectives may not only aid the trial judge in appraising the relevance of proffered proof but also promote settlement. The prayer for relief is often couched in generalities comparable to those of the substantive allegations. Particularization may be just as important here as

there. The *Handbook* is cautious in proposing that this should not be undertaken until after discovery has been substantially completed. No doubt there is wisdom in this caution. The Government may not be ready to state the full scope of the relief it will ask until discovery has revealed the full factual story and pointed the way to the remedy that should be applied. Yet if the prayer for relief has hidden important objectives of the action in catch-all phrases, it is hard to see why particulars should be withheld if their earlier disclosure, subject to later modification after discovery has been completed, will assist in setting bounds to discovery, and possibly promoting settlement. The analogy between particularizing the issues to be tried and the relief to be sought is strong. There is surely ample power in the court to insist, with whatever force and at whatever stage of the case the court may deem appropriate, that counsel state fully and frankly the objective sought by the Government in the case. Until that has been done to the full satisfaction of the court it is hard to see why counsel should be allowed to proceed further with the case. We have stated thus bluntly what the *Handbook* introduces with some caution. The important point is that the *Handbook* has taken this step forward. In the hands of skillful judges it may turn out to be one of the most effective recommendations in the *Handbook*.

New and important recommendations are made with respect to pretrial procedures in big criminal cases. These have no counterparts in earlier reports. It is recommended that pretrial conferences should be held in these cases with a reporter present in order "to refine the issues, establish rules for the handling of voluminous documentary evidence, resolve procedural problems, provide an atmosphere which will encourage voluntary agreements and, generally, to take any other action which will tend to simplify and expedite the trial of such a case".²⁸ It is suggested that these conferences can be invaluable in antitrust, mail fraud, conspiracy, Smith Act and net worth income tax cases. Instances of successful use of these procedures were stated by trial judges at the seminars.²⁹



Conway Studios Corp.

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It is recognized that in view of the constitutional guarantees that protect defendants in criminal cases, these pretrial conferences must be conducted on a voluntary basis. This is important and essential because the criminal jury trial is conducted in a world apart from its civil counterpart. Those differences are deeply rooted in our history and customs and find expression in the constitutional text. For example, there is no discovery on the criminal side such as the civil deposition and discovery rules. There is good reason for this. Indeed Chief Justice Vanderbilt has warned that just because there is liberality in discovery on the civil side it does not follow that there should be the same liberality on the criminal side. He points out that "In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and the suppression

23. *HANDBOOK*, 25 F.R.D. 405-406.
24. *Id.* 25 F.R.D. 406.
25. *Id.*
26. *Id.*
27. *Id.* 25 F.R.D. 398.
28. *Id.* 25 F.R.D. 399.
29. *Id.* 25 F.R.D. 399-402.

of evidence." He warns that the kind of discovery that has developed on the civil side "would defeat the very ends of justice" on the criminal side.³⁰

The recommendations in the *Handbook* mark a cautious advance into this new area. In the hands of a resourceful trial judge much may be accomplished if the goals of the *Handbook's* recommendations are pursued to the full extent of the trial judge's persuasive skills and powers. The *Handbook* urges him to try. That is an important step forward. Trial judges who have succeeded have recited their experiences at the seminars.³¹ The particulars of these instances of success may provide patterns for the future but it must never be forgotten that the trial of complex mail fraud, Smith Act and net worth income tax cases will still continue to be tried and fought out with all the color and intensity of advocacy that pervades a jury trial and that bears upon each item of proof. It is more likely that far more will be accomplished in the more genteel atmosphere of a criminal antitrust trial.

Proof of Technical and Scientific Facts

The last section of the *Handbook* deals with procedures for simplifying proof of complicated scientific, technical and economic facts through expert witnesses, sampling, polls, tabulations, charts, graphs, etc. As to the use of experts for proof of facts in the exact sciences, the *Handbook* is content to note that "no one has yet devised a generally acceptable method of proof in respect to these issues of exact science" and to describe five different methods that have been employed.³² No one method is recommended. The advantages and disadvantages of each are set forth.

In dealing with samples and polls, however, the *Handbook* breaks new ground in recommending their use. "Sample" is used to mean the physical examination of parts to establish the character of the whole and is confined to objectively observable facts. A "poll" is treated as the reporting of what people have "seen, think, do or believe" or "why they think, act or believe in a certain way."³³ Proof by sample

presents simple evidentiary problems. Thus, when a sample is offered through the testimony of the sampler there is no problem of hearsay though it must be shown that the sample was selected in accordance with accepted principles of sampling so that it properly represents the universe and may, therefore, be projected.

With respect to polls, if the poll is offered to prove only the fact that the persons interviewed made the statements attributed to them, there is no hearsay problem. As the *Handbook* states, that kind of poll is actually a sampling.³⁴ However, where the poll is offered to prove the truth of the statements made, then the poll is admissible only if it falls within an exception to the hearsay rule. The *Handbook* does not recommend creation of any general exception to the hearsay rule that would allow receipt of all polls but it does state the factors that should govern admissibility. The offeror, it is stated, must show the necessity for the poll and this means "the impracticability of making his proof by conventional methods."³⁵ The offeror must also show the trustworthiness of the particular poll or survey and that it was conducted in accordance with accepted principles of survey research. The requirements of this showing are set forth in some detail.³⁶ It is evident that the *Handbook* stands as an authoritative statement of the requirements that will in the future govern admissibility of this kind of evidence.

The appendix to the *Handbook* contains a collection of sample forms for use in implementing the recommendations. These are presented with the important caveat that they are not to be followed slavishly in each big case. On the contrary, they are presented to show methods and techniques that may be used to put the various recommendations into effect and to provide forms from which appropriate provisions may be selected to fit the special needs of a particular case.³⁷

In the use of these forms it is well to remember the wise words of the Prettyman Report of 1951 that "Each case of the kind here considered is a peculiar problem; it is *sui generis*. No uniform pattern of procedure can be

devised for them."³⁸ It is appropriate to apply these words to the entire *Handbook*. The strength of the *Handbook* lies in the fact that it does not contain a new set of rules, but rather is a collection of recommendations sifted, distilled and collected by experts from both Bench and Bar who have struggled with these cases. The purpose of the effort will surely be defeated if the recommendations are treated as suggestions that must be followed in all cases. That would simply engulf these cases in ever more procedures. The basic purpose was best stated by Judge Murrah in the preface when he said that the *Handbook*:

... is not a panacea. It contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial and pretrial procedure must be cast. Rather, it is a collection of procedures which are "Recommended," because, as the product of experience and the development of able minds, they are deemed worthy of consideration by all.³⁹

It is not likely that the future will see less litigation of this sort. On the contrary, there will likely be more. There is ample today when we look at the striking number of such cases in the Southern District of New York alone. The latest figure shows 350 such cases that have been assigned or await assignment to the seventeen judges in that district. The number may seem small in comparison with the thousands of other cases that crowd the dockets, but the impact and burden cannot be counted in statistics. It is to ease this burden and indeed to preserve the judicial process itself for the handling of these cases that this *Handbook* was prepared. If these objectives are to be attained the suggestions in this *Handbook* must be in the forefront in the handling of these cases from the beginning to the end.

30. *State v. Tune*, 13 N.J. 203, 98 A. 2d 881, 884 (1953).

31. See note 29, *supra*.

32. *HANDBOOK*, 25 F.R.D. 416-424.

33. *Id.* 25 F.R.D. 426.

34. *Id.* 25 F.R.D. 427-428.

35. *Id.* 25 F.R.D. 428.

36. *Id.* 25 F.R.D. 428-429.

37. *Id.* 25 F.R.D. 433-475.

38. 13 F.R.D. 65.

39. *HANDBOOK*, 25 F.R.D. 5.

Lawyers Must Be Effective Communicators

Much attention has recently been focused on the inability of many college students, including law students, to write correct, effective English. Professor Gormley points out that there is a similar deficiency in the use of oral communication—a deficiency unfortunately shared by many practicing lawyers. He proposes a program of training to remedy the situation.

by W. Paul Gormley • Assistant Professor of Law at the Chicago-Kent College of Law

REGARDLESS OF specialization, it is probably apparent to members of the legal profession that the most important single tool used by a lawyer is symbolic language. Considerable attention has been devoted to the shortcomings of law students and recent graduates in the use of written English; however, relatively little attention has been devoted to that academic discipline labeled "speech" by most universities.¹ A moment's reflection will indicate that even though a courtroom lawyer, corporation counsel, government attorney or office lawyer spends considerable time in employing the written language, most of the daily functions of any lawyer depend upon effective speech.

The purpose of this article is to indicate in a general fashion the reason why future attorneys and the present-day successful members of the Bar should seek more training and skill in speech in order to become more effective participants in society. The specific purpose of this paper is to show that the proper use of oral persuasion and communication is necessary to the lawyer in his daily activities.

The Need for Speech Training

If we look at the contemporary scene, it at once becomes apparent that the world leaders of today are effective speakers. Can we possibly imagine a mute Churchill, de Gaulle, Adenauer, Eisenhower, Kennedy,

Nixon, Castro or Khrushchev? An extended list could easily be provided to show that the statesmen of the world are effective communicators, even though we may wish that some of them were not quite so effective.

The need, in the first instance, is for effective communication—I do not mean the old discredited instruction that was offered in oratory and elocution around the turn of the century.

For the moment let us consider the peculiar importance of speech to the legal profession. First, the necessity for effective communication between the attorney and his client and other members of his law firm is obvious. In fact, many potentially successful careers never materialize because of faulty communication at this very basic level. In short, a professional person must be able to function in such interpersonal and group relationships. Nevertheless, it is in the courtroom, be it the International Court of Justice at The Hague, the United States Supreme

Court, or even a local municipal court, that the lawyer performs one of his most important functions. Effective communication should inform and persuade the hearer. Such men as Clarence Darrow and John W. Davis, to give only two examples of famous lawyers, would not have succeeded had they not mastered the spoken art.²

The same is true in politics and statecraft—such legally trained men as Webster, Lincoln, Bryan and Wilson owed a great deal of their success to effective spoken language. One need only recall the recent presidential election campaign to realize the impact of communicative and persuasive speech upon large sections of the American population.

It should be observed that lawyers are also citizens. While every citizen cannot be a great speaker, it should be stressed that there is a need for every person to become a critic of oratory, since the speech employed by the leaders of society must be properly evalu-

1. W. L. Matthews, Jr., *First Year Legal Writing and Legal Method in a Smaller Law School*, J. LEGAL ED. 201 (1955). H. Kalven, Jr., *Legal Writing Program in the Law School*, 2 U. CHI. L. S. REC. 8 (1953). G. Macaulay, H. G. Manne, *Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL ED. 387 (1959). For some articles touching on the importance of speech see A. S. Cutler, *Appellate Cases: The Value of Oral Argument*, 44 A.B.A.J. 831 (1958). Cutler states: "Few lawyers worth their salt amount to anything in a courtroom unless they have the ability to be persuasive, ingratiating and informative on their feet" (page 832). Raymond S. Wilkins, *The Argument of an Appeal*, 33 CORNELL L. Q. 40 (1947). He points out that oral argument affords the greatest opportunity, but the Bar generally is the poorest in quality in this area. John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895

(1940). For an example of the use of general semantics in law school instruction see Walter Probert, *Why Not Teach Semantics in Law School?* 10 J. LEGAL ED. 215 (1957).

2. The term "spoken art" is not synonymous with the commonly used phrase "speaking adequately", which generally refers to the ability to employ the minimal techniques of oral delivery. Conversely, the concept "spoken art" refers to the fact that the discipline of rhetoric was considered by the ancient rhetoricians to be in the realm of art rather than constituting a type of science, a mere skill or technique. Thus, in addition to mere utility, spoken rhetoric was deemed to possess certain qualities of beauty; moreover, it bore a relationship to poetry and drama. For a full discussion of the distinction see Charles Sears Baldwin, *ANCIENT RHETORIC AND POETIC* (1924). See also Aristotle, *Rhetorica, De Poetica*.

ated. The role of the critic should not be overlooked by the legal profession because legally trained persons play such a vital role in shaping public opinion.

Lester Thonssen and A. Craig Baird, two eminent scholars in the field of speech, maintain that if speech is to serve its proper function, working for good rather than evil, it will be necessary for every citizen to be able adequately to evaluate the spoken art. As they point out:

One of the logical implications of an appeal to a closer union between politics and rhetoric is the wisdom of extending training in oratory to every citizen. . . True, the complexity of modern society makes it more difficult for every man to participate directly in the deliberations of assemblies and in the administration of justice. Many of these duties have been delegated to men of professional rank in those callings. But every citizen still needs—in fact, needs more imperatively today—a familiarity with rhetoric, to the end that he may avail himself . . . [of democracy's advantages, specifically]: (1) of perceiving the difference between truth and error; (2) of understanding how people are moved to action, despite the absence of compelling argument; (3) of arguing both sides of a question in order to determine truth; and (4) of being able to defend himself with speech.³

An attorney, likewise, must exercise the evaluative functions of a citizen; however, he must go further and utilize the spoken language effectively in his personal, professional and civic activities if he is to formulate policy and shape public opinion on such vital questions as the acceptance of compulsory jurisdiction of the International Court of Justice by the United States, judicial and court reform and the protection of individual rights.

Furthermore, the need for effective speech is well recognized by our judges who are daily subjected to a type of defective speech that can not be designated as adequate communication and is certainly not very persuasive.⁴

The Suggestion: An Awareness of the Importance of Speech

The greatest single need is for more academic training in the field of speech, including such traditional areas as general speech, public speaking, oral read-

ing, discussion and debate. Moreover, there is now a desperate need for education in formal logic, classical persuasion, rhetoric and the newer areas of semantics, general semantics, group dynamics, symbolic logic and interpersonal relations. Of course, extended formal education is desirable, but too often this classroom training is not practical for busy practicing lawyers; nevertheless, a great deal can be accomplished on a limited scale.

The area of continuing legal education should be more concerned with offering instruction in the general language area. Most of the continuing legal education in the past has dealt with practice and "how-to-do-it" courses or advanced instruction in specialties such as patent law, labor law, admiralty law or taxation; no real attention has been given to the lawyers' most important tool—the spoken language.

The desirability of this sort of continued education was specifically recognized by the Arden House Conference on Continuing Legal Education when it emphasized this need in its Final Statement. According to the report:

American lawyers today are confronted with problems of vast and increasing complexity. No law school education can be expected to deal with all of these problems. A practicing lawyer has an obligation to continue his education throughout his professional life. This education not only must increase his professional competence but also better qualify him to meet his professional responsibilities to his clients and to the public.⁵

Although not covered by the final report of the Conference, the ability to communicate effectively will surely "... help the lawyer to fulfill a wide range of professional responsibilities; to the courts, to the administration of

justice, to law reform, to the law-making process, to his profession, and to the public".⁶

At the present time, special clinics and seminars in trial techniques are extremely popular, and valuable technical skills are being developed by the participants, but there is no real attention devoted to speech training.

Besides formal courses in schools, there is another approach that can be of real value—the toastmasters club, which may be utilized by the law schools, local bar associations or legal fraternities. To illustrate, when I was in law school, I had an opportunity to participate in and observe a toastmasters club conducted by one of the legal fraternities. Although the group was sponsored by one particular fraternity, the activity was open to all students in the law school, as well as students from neighboring law schools.

This group met on Sunday afternoons in a private dining room at a local restaurant. Each person would deliver a one-minute extemporaneous speech; later, there would be prepared talks five to fifteen minutes long, after which the members of the group would evaluate the performances. The aim was to have everyone participate as often as possible and to receive suggestions for improvement. The results were impressive, especially in the case of those who had not had prior academic training in speaking.

The National Toastmasters Clubs throughout the United States offer similar programs of instruction.⁷

Unfortunately, a toastmasters program has certain definite limitations. A casual Sunday group, with limited time and no specialized personnel, can not explore very deeply into such subjects as persuasion, logic, rhetoric and general semantics. Its activity is limited

on the principle that it always is of the highest, and often of controlling, importance", page 801. Cf. Rossman, *op. cit.*, *supra*. "The oral argument must not vanish. Its quality must be improved. . . the oral argument can help to keep the law human and adapted to the needs of life. It typifies the Bar at its best" (at page 676).

5. CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY (1959) page xlii. The subject was not mentioned in the body of the text, but there are several references to other articles and texts dealing with communication. See the "Bibliography" pages 74-88 and "Appendix E", *The Lawyer's Role as Advocate in Open Court*, pages 188-191 *et seq.*

6. *Ibid.*, page xv.

7. Seth A. Fessenden, *Toastmasters International*, 45 QUARTERLY JOURNAL OF SPEECH 462, (1959).

3. Lester Thonssen, A. Craig Baird, *SPEECH CRITICISM* (1948) page 467.

4. John T. Loughran, *The Argument of an Appeal in the Court of Appeals*, 12 FORDHAM L. REV. 1 (1943). George Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A.J. 675 (1959). Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801 (1951). Justice Jackson maintains: "Lawyers sometimes question the value of the relatively short oral argument permitted in the Nation's highest Court. They ask whether it is not a vestigial formality with little effect on the result. . . I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations. Most of them form at least a tentative conclusion from it in a large percentage of cases. . . The Bar must make its preparations for oral argument

ited to an exploration of the mere technical phases of oral presentation; and, although these technical aspects are very important, the effective attorney requires the advanced training that can only be provided through organized formal instruction.

The Solution: Formalized Courses of Instruction

The obvious solution is for the law schools and the bar associations to offer more formal instruction in oral communication. There is yet another possibility that should not be overlooked. It would profit many lawyers to take undergraduate or graduate courses in departments of speech in such traditional subjects as argumentation, debate, discussion, persuasion and public speaking, or to participate in workshops in interpersonal communication, group relations and techniques of communication.

A number of universities offer such programs in their evening or community college divisions, and a number of attorneys have enrolled in such programs.

The value of such instruction can not be too strongly stressed, and *it would be well if existing programs of continuing legal education could be integrated with the programs offered by universities.* For example, the local bar association might readily secure the co-operation of a local law school or university when specialized instructors and facilities are necessary.

Perhaps the greatest need at the present is for pre-law and law students to be given the opportunity to obtain the needed instruction. The problem facing the law schools is formidable, because there is an increasing pressure upon the already crowded curriculum from new subjects such as atomic energy law, international legal transactions, communications law and the law of outer space. As these newer areas compete for recognition and a place in the curriculum alongside the traditional bread and butter courses, there is still another demand. Related disciplines such as psychology, economics, sociology, criminology, forensic medicine, etc., are also highly useful subjects for the lawyer. The problem is to work in extensive additional areas of study in

the three years of law school.

Of course, it should be borne in mind that a great deal can still be accomplished by the law schools, provided the institutions and the instructors are equal to the task. One possible solution would permit law students to receive some of this instruction in related departments of the university and obtain a small amount of credit toward their law degree.

In the first instance, the law student must be made aware of the importance of effective communication in his daily classroom recitations. Too often students will merely recite for the instructor rather than for the other members of the class; frequently, the only concern is in learning "the law", and no attention is given to communication. Both student and instructor too often fall far short of the desired goal of persuasive speech.

The device of having law students stand while they recite a case has some utility, provided the students are constantly made aware of the importance of good delivery.

At the present, a few law schools offer courses entitled "Brief Writing and Oral Argument", and the value of such courses should at once be apparent. But the danger always exists that the oral argument portion will be slighted in favor of the brief writing and that the oral argumentation and persuasion will not be adequately stressed.

In addition, other courses in the curriculum, for example, trial practice and moot court, can also be of great value.

The extracurricular activities of the law school can also be of real value especially if mock trials are held in an atmosphere resembling an actual courtroom. Fraternity activities can be exceedingly valuable to students. Brief mention should be made of the National Moot Court Competition, which offers valuable preliminary instruction to many law students each year. Not only do the two or three representatives of each school gain valuable experience, but the numerous students who have taken part in the intraschool elimination have benefited from the training that is involved in actually participating in a mock appellate court case.⁸

Unfortunately, the students with no



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previous speech instruction profit the most, since the training provided can only deal with the very basic skills of delivery and not with the art of persuasion, proper evaluation and the related mental disciplines.

By way of summation, there has been a general lowering of correct speech standards, and our concern has shifted from the ideal of communicative speech to mere "audible speech", in the student's classroom recitations and elsewhere.

The most satisfactory answer to the problem would be for more prospective lawyers to take speech training in high school and college, but this solution will require an awareness of the need for such training on the part of the legal profession as a whole and closer co-operation between the profession, the law schools and the undergraduate colleges in order to insure that such courses are made available. For instance, one major university offers an

8. The writer can testify from his own experience as a faculty adviser of moot court teams that participants in both the intra- and interschool competitions improved considerably in their speaking ability. In particular, the team members developed the ability to think on their feet and answer questions extemporaneously under conditions somewhat approximating an actual courtroom situation.

undergraduate full-year course, with six semester hours' credit, entitled "Pre-Legal Argumentation" especially designed for students about to enter law school. Naturally, such a program must be taught by an instructor who is competent in both speech and law. Courses of this type are of great value in the education of any lawyer, and these courses provide an excellent opportunity for a joint effort between the liberal arts college and the professional law school. In fact, the necessity for such co-operation between the colleges and the law schools was recognized in 1959 at the Conference on Legal Education held at the University of Michigan. The Final Consensus of the Conference contained the following recommendation:

... Closer ties must be developed between law schools and colleges to bring to the legal profession a fair share of the highly gifted young men and women... The undergraduate colleges need more assistance than is being given at the present time in advising pre-law students... students should be advised that studies in the arts and sciences should be pursued which will produce... *the ability to organize materials and communicate the results orally and in writing.*⁹

The Michigan Conference went on to add:

The law schools have a right to demand of their applicants the capacity to read and understand, to organize, compose, write and speak effective English. The written and spoken word are the lawyer's tools and they must be sharp... *The law schools... must teach the student to apply to the law his ability to communicate...*¹⁰

Unfortunately, an extremely small percentage—actually, an infinitesimally small number of law students and practicing lawyers—have ever taken a single course in the high school or college speech department. In spite of the fact that such formal education was available, they did not avail themselves of the opportunity, largely because the profession and the law schools in the past have not clearly recognized the value of such training. Such courses are often not included in the requirements for an A.B. or B.S. degree because undergraduate counselors and advisers have not been informed of the tremendous need for speech education.

It can only be hoped that closer co-operation, as indicated above, will soon become an established fact.

The Vital Role of Speech to Our Democracy

Speech scholars already accept the

premise that there is a direct correlation between the amount of freedom of speech and democracy and human progress.¹¹ In order to have a free society, it is necessary that forensic and deliberative speech play a vital part in the social institutions of that society. When tyrants, dictators and despots reduce public address to merely ceremonial functions, verbal communication loses its significance. Speech played a vital role in the great democracies of Greece and Rome, as well as in England, the birthplace of our common law. On the other hand, the great tyrannies of history, including those of our own century, are specimens of societies in which speech has lost its significant position, societies in which it has become impossible to separate speechcraft from statecraft or the history of individual fundamental rights. These fundamental rights of citizens, which have developed in and are protected by the common law, are only operative in a civilization that preserves the proper role of forensic and legislative debate.

9. Charles W. Joiner, editor, *THE LAW SCHOOLS LOOK AHEAD: 1959 CONFERENCE ON LEGAL EDUCATION*, page 7 (italics added).

10. *Ibid.*, page 8 (italics added).

11. Thonssen and Baird, *op. cit.*, *supra*, pages 466-472.

Association Calendar

Annual Meetings

St. Louis, Missouri
San Francisco, California
Chicago, Illinois

August 7-11, 1961
August 6-10, 1962
August 12-16, 1963

Regional Meeting

Birmingham, Alabama

November 9-11, 1961

Board of Governors

St. Louis, Missouri

August 3-4, 1961

Illustrating the Small Publication

Mr. Smith offers some interesting and valuable suggestions to lawyers—and others—who have occasion to serve as editors of small publications with limited budgets.

by Edward P. Smith • *Executive Secretary of the Rhode Island Bar Association*

LAWYERS, BY THE nature of the profession, sometimes find themselves as advisers or editors, or both, of small publications. These publications may be professional association publications, trade journals, small industrial "house organs" or perhaps church or fraternal bulletins. The narrow financial confines of most of these small publications can be extremely challenging, but also confusing, frustrating and discouraging. But nobody will deny that these journals, which are designed to inform the members and the public of the activities of the publisher, perform a most valuable service. This service to the publisher is in direct proportion to the amount of readership the publication enjoys. In order to compete with all the other media and printed matter that seek the attention of the intended audience, the small publication must be attractive and interesting as well as informative. Nothing improves the attractiveness of any publication more than good illustrations to relieve the monotony of the printed text. It is in this field that many small publications needlessly fail, due mainly to the fear of editors that illustrations are complicated and expensive things with which to deal. It is this field that will be discussed in this article.

Help from Hobbyists

This article is aimed at the type of publications that cannot hire artists and photographers or maintain studios and darkrooms. If the publishing group

has members who are art hobbyists or camera-bugs, then these can either be the answer to the problem of illustrating the journal or the creation of a new problem—the new problem being how to explain to these members why the editor can't use all the drawings or pictures submitted. In order to stay within the limits of the title of this article, I cannot go into the various types of printing that might be used by the small and low-budgeted organizations who are now, or are contemplating, publishing a journal. However, a condensed and very adequate discussion of these matters can be found in Chapter II of the book *Bar Association Organization and Activities* by Glenn R. Winters, published in 1954 by the American Jurisprudence Society.

If the small publication is mimeographed, about the only type of illustration that can be used is the simplest of charts and line drawings. Yet even these are helpful in relieving monotony, so don't overlook them. From the illustration point of view and for reasons of competing for readership, I feel the only acceptable reasons for mimeographing a small publication are:

- (1) A completely "captive audience", and
- (2) A financial status that permits only mimeographing (which is often false economy).

Illustrations do add to the cost of printing any publication. Photographs, because they must be "screened", cost



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more than line drawings. Screening puts the "dots" in reproduced photographs. But let's not get into the mechanics—this could develop into another article. Since the success of the publication depends on readership, readership depends on attractiveness and attractiveness depends greatly on illustrations, then the small additional costs of illustrations are wise investments.

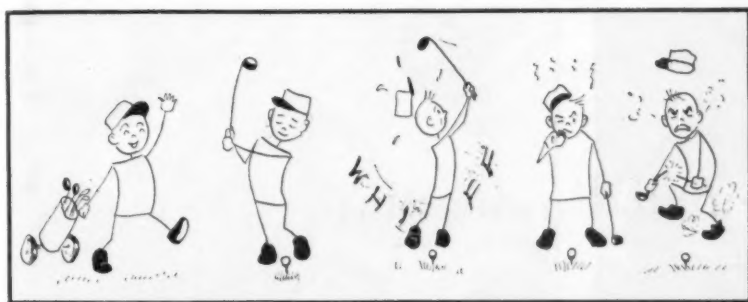


Exhibit A. Simple circles, rectangles and lines can successfully illustrate a story as long as there is action.

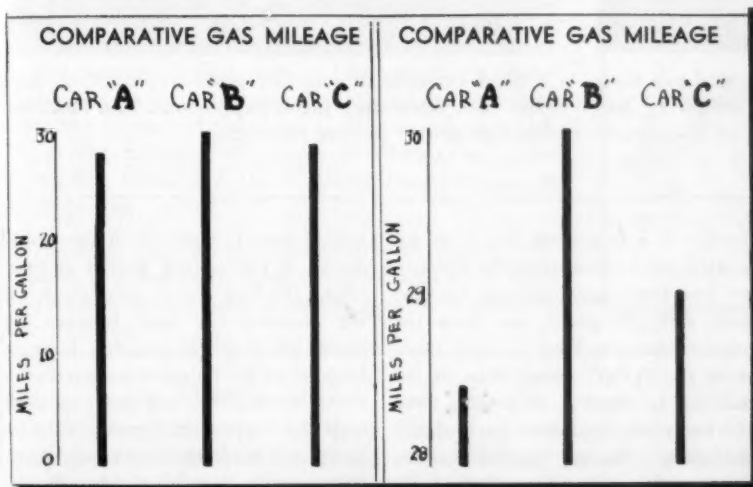


Exhibit B. Charts—emphasis on similarity or difference?

Line Drawings

Let's talk about line drawings first, since they are less expensive than photographs. Some folks can't visualize a successful publication that does not use photos, but uses only drawings. Yet if I mention the *New Yorker*, I'm sure all would recognize it and agree that it is a successful and attractive publication. (Just for the record, I realize that they do use photographs in the ads, but the advertiser pays for those.)

Line drawings need not be "works of art", which is why they are so valuable to the small publication. Notice the animated figures of TV. Certainly they are of the simplest construction, and their effectiveness is based on their simplicity. The most important thing in a line drawing is "action". Simple

circles for heads, rectangles for bodies and lines for limbs are enough if they are properly arranged to denote action. Facial expressions are extremely helpful and they are not as difficult to draw as one might think. Exhibit A tells a short story of a complete change of mood, yet a child could draw it.

Charts and graphs are a form of line drawing. The old saying of "Figures don't lie, but liars can figure" is particularly true of charts and graphs. So we must choose the point we want to emphasize before we plan our chart. Exhibit B shows the same figures on two different charts. Which point do we want emphasized—the differences in the figures or the similarities?

In order to get sharp reproductions

Illustrating the Small Publication

of line drawings and charts, always use a jet black india ink and white paper. Special drawing pens are inexpensive and can add unusual and professional touches to the work. Any art shop can help in this matter.

The Photograph

All of us possess an ego and we all like to see our name in print. It is even more flattering to most of us if our picture appears in a publication. Wise editors use as many names and photos of members or readers as possible short of publishing a pictorial directory. It is now possible for everybody to become a satisfactory photographer without a tremendous outlay for camera, film, dark room and pounds of photographic gadgets. I have found the new "sixty-second" cameras to be extremely valuable to publications such as we are discussing here. I am no camera-bug. I have taken home movies and have used simple box cameras, but I have never developed or printed a single picture myself. I don't know the first thing about dark rooms, fixers or emulsions. Yet the photographs appearing with this article were taken by me with a Polaroid camera, Model 95 B, using Polapan 400 film. Since Polaroid is the only manufacturer of this type of equipment, I don't think I need to be coy about naming it. Again for the record, I have not received any "payola" for plugging the camera.

Some folks have asked me if the Polaroid was expensive to use. To me, for this type of work, the Polaroid is the least expensive to use. Here's why. If I want only one picture, I need take only one. I don't have to "use up the roll" to get one picture in a hurry. I don't have to wait days to see if my inexperienced eyes have erred in setting exposure and focus. If I'm wrong, I know it in sixty seconds and can make corrections and shoot again while the subjects are still present. I don't have to apologize to anyone later on that "none of my pictures came out". When I consider that there is little wastage of film and that there is no additional development cost to the Polaroid film, then it is actually cheaper than the conventional film. I haven't used the new "wink light" or the new super film,



"You Are There" in this photo. Background and foreground are important to this shot taken during live TV broadcast of Law Day ceremonies in the Rhode Island Superior Court.



A good example of unposed photography. You can't pose such interesting facial expressions. The faces are what make this picture interesting.

but it sounds good, and I probably will try it soon. The camera, carrying case, flash attachment and shield costs just a little over \$100. I figure each shot I take costs about 40 cents, including the flash bulb. A professional photographer would charge about \$5.00 for one shot and \$2.00 per additional shot at the same site. With these figures in mind, the camera pays for itself in short order.

There is another advantage I have found in being my own photographer. As Executive Secretary of the Rhode Island Bar Association, I attend most, if not all, the functions of the association anyway, so no schedule or appointment has to be worked out with a photographer. Neither do I have to argue with the cameraman as to what picture I want.

What and How To Photograph

Now we come to the problems of what photographs to take and how to take them. Again, as in line drawings, action is important. Readers soon get tired of seeing posed photos of people, rank upon rank, with teeth flashing, staring straight at the camera. Sometimes this can't be avoided, but whenever possible some action should be taking place in the photo. The more natural the action, the better. The viewer should get the feeling of "being

there". If a committee has been appointed, try to show what the committee has been appointed to do. Use some sort of "prop" and have the committeemen looking at each other or at the "prop" rather than at the camera. In pictures of people, faces are the most important part of the photograph. So get the subjects as close together as possible and eliminate background scenery. The exceptions to this, of course, are to avoid unnatural crowding or excluding background that may actually be part of the story the picture is to tell. This brings us to "cropping".

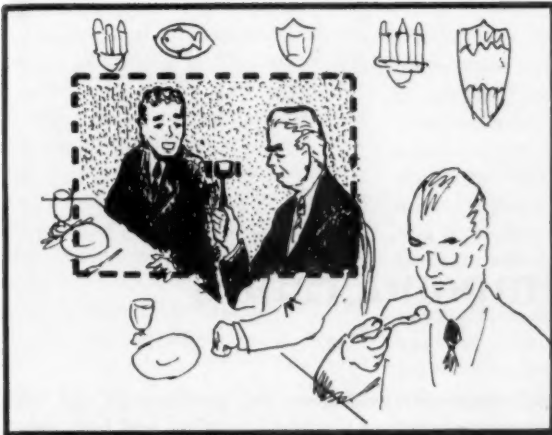
Many times what is at first glance a deadly dull photograph is turned into an exceptionally good one by clever "cropping". This is simply cutting away unneeded parts of a photograph in order to concentrate on a particular part of the picture in which there "is something going on". "Cropping" isn't hard to master, either. Remember that the photograph can be enlarged or reduced fairly easily by the printer. Seldom will we have a photograph that will be reproduced in exactly the same size as the original print. The best way to "crop" is to turn the print over and hold it up to a bright light. Looking through the backside this way we can mark off the section of the photograph that we want to use. Mark it lightly

with a pencil. Then put it down and mark off the section with a straight edge. It's best not to bear down on the backside too hard because the photo will crack if you do. I try to keep all my photographs rectangular in shape because they are easier to work with this way when figuring enlargements or reductions. With enough variations in the dimensions of such rectangular pictures, an interesting layout can be achieved.

When placing a photo in a layout, the professional journalists tell us that the action should face "in" to the page. The theory is that the reader "follows" the action of the picture to the text. Thus, if the line of action of the illustration leads the reader off the page, he won't read the text, and you've lost him. However, if he is "led into" the page by the line of action of the illustration, then he may read items that would not have attracted him if it hadn't been for the illustration. Remember, the whole point of the publication is to get your message read.

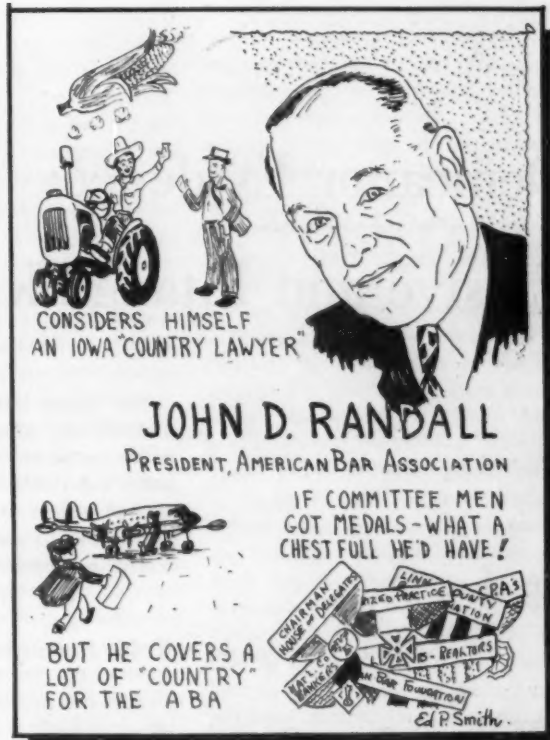
"Sports Cartoon" Drawings

There is one type of illustration that I have saved for last which I feel is very effective if it's used wisely. This type of illustration can be used only if the following two factors can be met: (1) the story to be illustrated lends itself to this type of illustration,



The diagram at the top shows how cropping a photograph can improve the picture. The dotted line indicates the portion of the original photograph in which "something is going on". Note the elimination of the distracting items and the resulting concentration on faces and the award.

The diagram at the right illustrates the "sports type" drawing, often a useful form of illustration when other approaches to the same material may be ineffective.



and (2) there is an artist in the group or if the expense of hiring an artist is worth the effect gained by the use of the illustration. I call this type of illustration the "sports cartoon" drawing. If the two factors above can be met, the editor will receive many appreciative comments. It can tell a story at a glance in an attractive manner. *Time* and *Newsweek* magazines often-times use a very sophisticated version of this type of illustration on their covers with notable success. Sports pages of newspapers have used these drawings for years, and this is why I call them "sports cartoon" drawings.

Here is an example of how the use of this type of drawing can be successful when other approaches to the same story may be ineffective. An industrial

firm for which I worked wanted to "introduce" some of its technical staff and supervisory personnel to its employees who might otherwise not know them. The ordinary photograph and biographical write-up can be awfully dull sometimes. Industrial publication readership surveys indicated that stories about "bosses" had very low readership ratings. So we decided to try the "sports cartoon" approach. These cartoons were filled with action and kept the words to a minimum, thus "flashing" the man's abilities and background across the readers' minds. We knew we were accomplishing our purpose when employees began to ask us whom we were "going to 'do' next". The subjects got a kick out of the drawings, too, and oftentimes wanted

the original for their office. Sometimes "sports cartoons", properly framed, can be used as gifts and awards at parties and dinners.

The "staffs" of the publications of the type discussed here are usually volunteers or perhaps do the editorial work as an extra in addition to other duties. Yet in spite of all the gripes about lack of time, money and equipment, most of the folks I know who do this work in their "spare time" experience the wonderful thrill of creating something worthwhile from "next to nothing". So to my fellow laborers in this vineyard, I temper my sympathy with encouragement. I hope you have as much fun with your spare time editing as I do.

Demeanor Evidence: Elusive and Intangible Imponderables

Mr. Sahm writes of demeanor evidence—the problem of the trier of facts who must determine whether a witness is lying and how much of his testimony is to be believed. In courts, the general rule is that the judge's decisions on this demeanor evidence will not be disturbed upon appeal unless clearly erroneous, but the rule is by no means clearly applicable to decisions on credibility by trial examiners in administrative proceedings.*

by Henry S. Sahm • *Trial Examiner for the National Labor Relations Board*

ONE OF THE most difficult tasks facing a trier of the facts, whether he be a judge hearing a case without a jury or a hearing examiner in an administrative adversary proceeding, is evaluating and resolving questions of credibility based upon observation of a witness while he is testifying. This is referred to as demeanor evidence and is based on personal observation of the conduct and deportment of the witness on the stand. By such personal observation, the trier of the facts is enabled to observe and weigh the elusive and incommunicable evidence of a witness' deportment while testifying in the solution of the always difficult problem of determining the truthfulness of his testimony. What then, are these elusive and incommunicable indicia upon which to estimate credibility, particularly when the witnesses' respective versions of the crucial facts are diametrically opposed and recourse must be had to evaluating their demeanor? The indicia which Chief Justice Appleton enumerates are "the promptness and unpremeditatedness of [the witnesses'] answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness . . . The

appearance and manner, the voice, the gestures, the readiness and promptness of their answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control—fear, love, hate, envy, or revenge—are all open to observation . . ."¹

The late Judge Jerome Frank in a scholarly discussion had the following to say about such evidence:²

[Demeanor evidence] has had a long history. In the earlier period of Roman legal development, according to Millar, the witnesses testified orally before the judge, and the practice of having oral testimony heard by the judge prevailed originally in the Roman canonical procedure. Ullman tells us that the 14th century Postglossators—who, as judges or advocates, "had their eyes fixed upon the practical administration of the law"—maintained that the indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally . . . The personal impressions made upon the judge by the witnesses, their way of answering questions, their reaction and behavior in Court, were the only means of ascertaining whether the statements were trustworthy or not . . . It was thought necessary, therefore, that the judge . . .

should put on the record in the files any specific reactions, e.g., that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation . . . Subsequently, however, written testimony became in general the norm in canon and lay continental courts until the 19th century. In English Chancery it came about that the "canon law influence prevented the oral examination of witnesses save as an extraordinary measure," while at English common law the testimony was oral. For the most part, America inherited this difference between chancery and common law procedures. In the federal courts, except for a short period from 1789 to 1802, oral testimony in open court was not required in equity litigation; indeed, for many years it was virtually banned. But Rule 46 of the Equity Rules of 1912 reverted to the 1789-1802 practice of reliance on oral testimony as the normal method in equity suits. The present Civil Rules continue that valuable reform.

There are no prescribed rules or methods of evaluating the credibility of oral testimony. It is a difficult task for the trier of the facts in the brief time that the witness testifies to ascertain whether he is telling the truth.

* The views expressed herein are exclusively those of the writer.

1. WIGMORE ON EVIDENCE, 3d Edition, §1395, citing Appleton, EVIDENCE, 220.

2. N. L. R. B. v. Dinion Coal Co., 201 F. 2d 484, 487 (2d Cir.).

More important, in this regard, than knowledge of the substantive law and the law of evidence is "the natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying... The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood; and if he did, his observations would probably be of little use to others. Every man must learn matters of this sort for himself, and though no sort of knowledge is so important to a judge, no rules can be laid down for its acquisition... No process is gone through, the correctness of which can be independently tested. The judge has nothing to trust but his own nature and acquired sagacity."³

As one court graphically stated it:

...one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify...⁴

Again, Judge Frank had the following to say:

...For the demeanor of an orally-testifying witness is "always assumed to be in evidence." It is "wordless language." The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned. For such a court, it has been said, even if it were called a "rehearing court," is not a "reseeing court." Only were we to have "talking movies" of trials could it be otherwise. A "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." It resembles a pressed flower. The witness' demeanor, not apparent in the

record, may alone have "impeached" him...⁵

The same principles are applicable in adversary proceedings of an administrative agency before a hearing examiner, since the circumstances are similar to those which pertain in the case of a juryless trial before a judge who must determine the credibility of the witnesses that appear before him. Witnesses, whether they testify in a court of law before a judge without a jury or in an administrative proceeding before a hearing examiner, universally display the same characteristics, which present the same problems in evaluating and resolving the credibility issue based upon demeanor evidence.

In crediting some witnesses and discrediting others, in giving weight to certain evidence as against other evidence, in drawing inferences from circumstantial and conflicting evidence, and finally in coming to certain conclusions, the judge or hearing examiner necessarily has to detect and appraise various "potent imponderables permeating the entire record".⁶ One of these "potent imponderables" is the demeanor of witnesses in testifying, particularly where findings of the trier of the facts rest on the evaluation of the credibility of oral testimony.

Credibility findings rest to varying degrees upon the evaluation placed by the trier of the facts upon the demeanor of witnesses. This type of evidence, which does not appear in the record and is comprised of elusive intangibles and "potent imponderables" which are difficult to capture and to describe by written words, often make it difficult for the trier of the facts to convey or describe the impression which a particular witness makes upon him. This difficulty is inherent in making credibility findings where the trier of the facts must choose between discordant versions of witnesses whom he has observed without revealing the factors which may have determined his choice.⁷

Judge Learned Hand describes them as "[findings] based on that part of the evidence which the printed words do not preserve. Often that is the most telling part, for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors,

when the words alone leave any rational choice... nothing is more difficult than to disentangle the motives of another's conduct—motives frequently unknown even to the actor himself. But for that reason those parts of the evidence which are lost in print become especially pregnant..."⁸

In crediting or discrediting a witness' testimony, there are gaps to be filled, ambiguities to be resolved, inconsistencies to be considered which cannot, in many instances, be determined exclusively upon the basis of the cold record. The trier of the facts is often acutely aware that a witness he is crediting may, in testifying, have been vague, hazy, inconsistent and lacking in the attributes of the classic fictional witness whose demeanor is impeccable and testimony perfect in all regards. Such are the realities of litigation. Witnesses are on occasions fouled by the air of bias, partisanship, overzealousness and other emotions that flesh is heir to. Witnesses do not emerge from sterilized surroundings nor do they testify in a vacuum which protects them from the failings to which the human mind and spirit are subject. Moreover, unconscious and unintentional inconsistencies understandably creep into a record, for witnesses testify from memory as to events and conversations that may have taken place long before they have to relate them.

If, in order for the trier of the facts to credit a witness his testimony must be found to be lucid, unambiguous and consistent in all details, there would be few, if any, witnesses who could meet such exacting and unrealistic

3. Stephen, *THE INDIAN EVIDENCE ACT, WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE*, pages 41-43.

4. *Creamer v. Bivert*, 214 Mo. 473, 113 S. W. 1118, 1120-1121.

5. *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F. 2d 77, 80 (2d Cir.).

6. *I. A. of M. v. Labor Board*, 311 U. S. 72, 79.

7. *N. L. R. B. v. James Thompson & Co., Inc.*, 208 F. 2d 743, 746 (2d Cir.); *N. L. R. B. v. Chautauqua Hardware Corp.*, 108 F. 2d 750, 751 (2d Cir.); *Casa Grande Cotton Oil Mill*, 110 N.L.R.B. 1834, at 1836. In Editorial "El Imparcial", 131 N.L.R.B. No. 38, footnote 1, the National Labor Relations Board stated: "The Trial Examiner's Intermediate Report states that the General Counsel's and Respondent's witnesses gave conflicting testimony regarding the content of the speech, and that the witnesses for each of the parties failed to impress him that they were telling the whole truth. The Trial Examiner failed to credit any of the witnesses, and consequently found that the General Counsel had not proved the allegation by a preponderance of the testimony and recommended its dismissal. In these circumstances we affirm the dismissal of the allegation."

8. *N. L. R. B. v. Universal Camera Corp.*, supra, 190 F. 2d 429, 430, 431 (2d Cir.).

Demeanor Evidence

tic requisites. Such an exacting standard would ignore the normal and reasonable frailties of the human memory, since disagreements between witnesses are not an uncommon phenomenon when honest men attempt to reconstruct precisely what each has seen and heard.⁹ Such a stringent standard would result in an inability to "make specific credibility findings as to testimonial evidence necessary to support findings of material fact";¹⁰ one of the most vital functions of a hearing examiner or a judge hearing a case without a jury.

Therefore, to point out inconsistencies in the testimony of a witness credited by the trier of the facts adds nothing and may amount to petty carping. It should be kept in mind that "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."¹¹ Accordingly, the one who hears and sees the witnesses testify must, where the conflicting versions are diametrically opposed, often necessarily depend on subtle interpretations, delicate nuances and indefinable impressions which the cold record does not convey. Of course, the record often reveals, exclusive of so-called demeanor testimony, where the truth lies. It is only when, at the end of his deliberations, the trier of the facts finds that questions of credibility still remain balanced in doubt that he must have recourse to the witnesses' demeanor.

It is often quite difficult, if not impossible in some instances, to describe by the written word the impressions derived from observing a witness testify. Impressions are extremely difficult to imprison within any form of words. Not only would it not serve any useful purpose but it would unduly prolong and add nothing to a decision to describe a witness as having a furtive look, a nervous twitch, a flushed face or perspiring freely. Those indicia are better left unsaid in the hope that judgment as to such matters should be left to the sense and experience of the one who observed the witnesses, guided, of course, by acceptable standards.

However, the Labor Board in two recent cases, *Allied Chain Link Fence*

Co., 126 NLRB No. 74 and *Buckley Development Co.*, 126 NLRB No. 147, indicates that examiners must, in the future, spell out in detail, the indicia upon which they believe one witness as against another. In both those cases the Board reversed the examiners' credibility resolutions because they did not rest their evaluation of the witnesses' credibility on "demeanor". Both examiners merely prefaced their conclusions by stating that they based their credibility findings on their "observation of the witnesses". Evidently, this is not sufficient. It would appear that in evaluating a witness' testimony in terms of demeanor evidence, the Board will require examiners to delineate specifically the impressions derived from observing the witness testify.

Then, too, in evaluating a witness' testimony as credible or incredible, in terms of demeanor evidence, the trier of the facts, since he is not dealing with absolutes or generic matters must necessarily adopt an empirical approach. Human factors, emotions and the "intangible imponderables" present at every hearing militate against the substitution of another's judgment as to where the truth lies. This is so, since different concepts, indicia and standards, not only legal but also ethical may be applied, depending on what the individual trier of the facts conceives and defines these factors to be and how he relates them to the peculiar circumstances present in any given case in which a credibility finding based upon demeanor testimony is to be made. A margin must be left for the individual judgment of the one who sees and hears the witnesses testify.

Credibility findings play a particularly important part in National Labor Relations Board unfair labor practice proceedings, which are traditionally adversary in nature. The Board has



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recognized that "the demeanor of witnesses is a factor of consequence in resolving issues of credibility" and "that credibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe".¹² The Board has stated that it is its policy to attach great weight to a trial examiner's credibility findings insofar as they are based on demeanor, and that it will not overrule a trial examiner's resolutions as to credibility except when the clear preponderance of all the relevant evidence convinces it that the trial examiner's resolution is incorrect.¹³ This policy, the Board states,¹⁴ "is grounded in the fact that, unlike the Board, the Trial Examiner, by virtue of his direct observation of witnesses at the hearing, has the opportunity to observe and evaluate factors of appearance and demeanor of witnesses."¹⁵ "However," the Labor Board

9. As the Second Circuit Court of Appeals said in *N. L. R. B. v. Regal Knitwear Company*, 140 F. 2d 746, "... confusion as to details... is not uncommon in the stories of entirely honest and reliable witnesses."

10. *Casa Grande Cotton Oil Mill*, 110 N.L.R.B. 1834, at 1836.

11. *N. L. R. B. v. Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir.), reversed on other grounds, 340 U. S. 474.

12. *Hadley Manufacturing Corporation*, 108 N.L.R.B. 1641, 1643; *Roadway Express, Inc.*, 108 N.L.R.B. 874, 875.

13. *Standard Dry Wall Products*, 91 N.L.R.B. 544, 545. See, however, *Allied Link Fence Co.*, 126 N.L.R.B. No. 74.

14. *Valley Steel Products Co.*, 111 N.L.R.B. 1338, 1345.

15. The Board does indeed place great reliance upon the examiner's opportunity to observe directly the demeanor of witnesses while testifying. In *Lykes Bros.*, 128 N.L.R.B. No. 68, the respondent filed exceptions to the examiner's intermediate report alleging, *inter alia*, that the record should be re-opened in order to permit it to introduce evidence relating to the physical arrangements at the hearing, contending that because of such arrangements the trial examiner was not able properly to observe witnesses for purposes of credibility resolutions. The Board by order dated April 9, 1959 (*Lykes Bros.* 10-CA-2509, 10-CB-583), remanded the proceeding to the trial examiner ordering him "to permit the parties to introduce evidence relating to the physical arrangements at the hearing, insofar as they bear on the trial examiner's opportunity to observe the witnesses".

stated in *Valley Steel Products, supra*, "the Act commits to the Board itself, not to the Board's Trial Examiner, the power and responsibility of determining the facts as revealed by a preponderance of the evidence and the Board is not bound by the Trial Examiner's findings of fact, but bases its findings upon a de novo review of the entire record. Therefore insofar as credibility findings are based upon factors other than demeanor . . . the Board will proceed with an independent evaluation."¹⁶

Furthermore, the National Labor Relations Board has held that it "is not bound by inferences drawn or conclusions reached by a Trial Examiner based on facts or credited testimony, as the Trial Examiner's observation of demeanor does not give him any advantage in logically evaluating such evidence."¹⁷

Section 10(e) of the National Labor Relations Act¹⁸ provides, *inter alia*, that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." However, the "substantial evidence" standard is modified where the Trial Examiner and the Board differ. In *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, 496, in a case where the trial examiner and the Board differed, the Supreme Court, in commenting on the evaluation of demeanor, stated:

...evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.

In *N. L. R. B. v. Thompson & Co.*,¹⁹

where the Board reversed a credibility finding of an examiner and the court, in turn, reinstated the reversed finding, Judge Learned Hand said:

This issue seems to us to be one on which the examiner's findings should have prevailed under the doctrine of *Universal Camera Corp. v. Labor Board*, 340 U. S. 474 . . . As was inevitable, the Supreme Court did not try to lay down in general terms how far the Board should accept the findings of its examiner. Plainly it did not mean them to have the finality of the findings of a master in chancery, or of a judge; but it necessarily left at large how much less reluctance the Board need feel in disregarding them than an appellate court must feel in doing the same to the findings of a district judge. The difficulty is inherent in any review of the findings of a judicial officer who chooses between discordant versions of witnesses whom he has seen, because the review does not bring up that part of the evidence that may have determined his choice. Over and over again we have refused to upset findings of an examiner that the Board has affirmed, not because we felt satisfied that we should have come out the same had we seen the witnesses; but because we felt bound to allow for the possible cogency of the evidence that words do not preserve. We do not see any rational escape from accepting a finding unless we can say that the corroboration of this lost evidence could not have been enough to satisfy any doubts raised by the words; and it must be owned that few findings will not survive such a test. So tested it seems to us that the examiner's finding should stand . . .

In *N. L. R. B. v. Philadelphia Iron Works*,²⁰ the Court said: "the testimony would have been adequate to support a finding in [petitioner's] favor [but] . . . Of all three judging bodies so far concerned with this case, the trial examiner, the board, and this

court, only the first had the opportunity of observing the witnesses as they related what they knew about the matter. Obviously, he was in the best position to weigh and sift the testimony."

It has been stated²¹ that "many of the Courts of Appeals feel almost predisposed to set aside agency findings in cases where the agency has reversed the hearing officer on a question of fact. Some of the courts feel that in this situation they have the right to determine in which direction the evidence "preponderates". For example, in *Minneapolis-Honeywell Regulator Co. v. F. T. C.*, 191 F. 2d 786 (7th Cir. 1951), the court declared that where the findings of a trial examiner are supported by "a preponderance of the evidence" the action of the Commission in rejecting them is arbitrary.

In *U. S. Steel Co. v. N. L. R. B.*, 196 F. 2d 459, 467 (7th Cir. 1952), the court came close to indicating that the agency cannot overrule its trial examiner on a question of credibility of witnesses, declaring: "We may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." Similarly, in *Deepfreeze Appliance Division v. N. L. R. B.*, 211 F. 2d 458, 461 (7th Cir. 1954), the same Court of Appeals declared: "An examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony." This case suggests that where the agency does overrule the trial examiner on the question of credibility, the appellate court will then determine whether the preponderance of the evidence is with the Trial Examiner or the Board; at least, the court noted, in setting aside the Board's findings, that "there is no pre-

16. Justice Frankfurter, speaking for the Supreme Court in *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 494, in discussing the hearing examiner's function in the over-all administrative process stated that the legislative history of the Administrative Procedure Act confirms that "enhancement of the status and function of the trial examiner was one of the important purposes for administrative reform. This aim was set forth by the Attorney General's Committee on Administrative Procedure: 'In general, the relationship upon appeal between the hearing commissioner and the agency ought to be a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses,

is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.'"

17. *Lewisville Flooring Company*, 108 N. L. R. B. 1442, 1444, footnote 3. In *N. L. R. B. v. Turner Construction Company*, 227 F. 2d 498 (6th Cir.) where the Court refused to enforce the Board's decision (110 N.L.R.B. 1688) the court held that there are also limitations on inferences drawn by the Board, stating at page 501: "It is, of course, the function of the Board to draw inferences but they must be based on evidence and reasonable." In *N. L. R. B. v. Kaye*, 272 F. 2d 112, 114 (7th Cir.) where the Board's petition for enforcement was denied, the Court stated that "inferences contrary to direct testimony are not ordinarily sufficient to support a finding". In this connection, a distinction must be made, between "basic or

subsidiary facts and the ultimate facts inferred therefrom". If the inference is derived from facts based on "erroneous legal foundations" or if it is "without reasonable foundation" then the Supreme Court has held the conclusions inferred from the basic or subsidiary facts to be unreasonable. *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U. S. 105, 76 S. Ct. 679; *N. L. R. B. v. Truitt Manufacturing Co.*, 351 U. S. 149, 76 S. Ct. 753. See Justice Frankfurter's concurring opinion in *N. L. R. B. v. Insurance Agents Union*, 80 Sup. Ct. 419, 435.

18. 29 U.S.C. §160(e).

19. 208 F. 2d 743, 745-746 (2d Cir.). See also *Gamble-Skogmo, Inc. v. F.T.C.*, 211 F. 2d 106, 113 (8th Cir.).

20. 211 F. 2d 937, 942 (3d Cir.).

21. Cooper, *The "Substantial Evidence" Rule*, 44 A.B.A.J. 1002 (October, 1958).

ponderance of the evidence" to support the findings made by the Board in overruling its trial examiner.

Dean James M. Landis, Special Assistant to the President, in his "Report on Regulatory Agencies to the President-Elect" (December 21, 1960), in discussing the National Labor Relations Board and docket congestion, stated at page 64:

Here again giving more effective finality to the examiner's findings is the answer.

President Kennedy, in his special message to Congress on regulatory agencies, discussing the reduction of excessive delays and workloads, recommended that:

The remedy is a far wider range of delegations to smaller panels of agency members . . . and to give their decisions and those of the hearing examiners a considerable degree of finality, conserving the full agency membership for issues of true moment. [*New York Times*, April 14, 1961, page 12.]

The Advisory Panel on Labor-Management Relations to the Senate Committee on Labor and Public Welfare in discussing methods for limiting the number of trial examiner's intermediate reports reviewed by the Labor

Board suggested that review of such reports should be made discretionary and the intermediate report of the trial examiner should be final in all cases in which review is denied. The Advisory Panel stated:²²

Many unfair labor practice cases turn upon questions of fact, some involving the reliability of inferences and others turning upon the credibility. This is a time-consuming procedure, especially when performed upon a printed record. Most of these cases present no issue of law or policy which warrants Board deliberation. Apart from NLRB cases there are very few legal proceedings in which there is de novo review of the facts after the decision by the initial tribunal which heard the witnesses. A master's findings of fact are binding unless "clearly erroneous." The findings of a Federal trial judge are also accepted by the appellate court unless "clearly erroneous." In admiralty the rule is the same.

Trial examiners are carefully selected. Most of them have had long experience. There is no reason to suppose that the findings of fact of an experienced trial examiner who actually hears the evidence are less likely to be correct than the findings of a staff legal assistant working upon a cold transcript of the testimony.

Two methods are available for giving the trial examiner's report greater finality. The statute should contain a

simple declaration giving his findings of fact the same finality as a master's findings, viz, "The findings of fact made by the trial examiner shall be final unless clearly erroneous."

If Board members and their legal assistants sincerely followed this rule, there would be little need for prolonged study of conflicting testimony. One can make up his mind whether a finding is clearly erroneous far more quickly than he can determine whether it is exactly correct.

However, whether the credibility findings of the trier of the facts are "exactly correct" or "the truth" is something he will never know. Truth, in the abstract sense, is so elusive that it is not given to mortals ever to know it with certainty. He must cope with it as well as is humanly possible by the use of natural faculties and acquired experience, and the miscarriages of justice in which he will become unconsciously involved must be ascribed to the imperfection of our means of arriving at truth. The trier of the facts must find consolation, therefore, in the aphorism that knowing the truth is a divine and not a human attribute.

22. Organization and Procedure of the National Labor Relations Board, Senate Document No. 81, 86th Congress, 2d Session, page 14, dated January 15, 1960.

The University of Miami School of Law is currently conducting a special tuition-free, nine-month program for Cuban refugee lawyers, which will run from February 27 to December 27, 1961. The nine-month course, a survey of United States law, will embrace most of the traditional categories of the law school curriculum. Successful completion will lead to an award of a certificate. The lectures are being given by the University of Miami law faculty and Dade County practitioners. Provision has been made for simultaneous translation of the lectures into Spanish and the students are provided with basic reading materials in Spanish and English.

A Notice and Invitation from the National Conference of Commissioners on Uniform State Laws

The National Conference of Commissioners on Uniform State Laws will meet in its seventieth year at the Chase-Park Plaza Hotel in St. Louis, Missouri, from July 31 through August 5.

Approximately one hundred and forty Commissioners appointed by the Governors and representing the states are expected to be in attendance. They will include many deans of law schools, professors of law, federal and state judges, attorneys general, legislators and practicing lawyers.

The first formal session of the Conference will be convened at 11:30 A.M. on July 31. At 2:00 P.M. of that day, the seven sections of the Conference will convene to consider the proposed uniform and model acts in the draft form as prepared by the Drafting Committees. On Tuesday, August 1, the Conference will start a series of twice-daily sessions in which word by word consideration will be given to the drafts as they come from the Sections. Under the constitution and by-laws of the Conference, no act may be finally promulgated as a uniform act unless it has received such consideration at not less than two annual meetings.

Three revised uniform and model acts are being considered for final approval by the Conference at these sessions and the uniform acts will thereafter be submitted to the House of Delegates of the American Bar Association for its approval. They are:

Revised Uniform Principal and Income Act

Revised Uniform Federal Tax Lien Registration Act

Revised Model State Administrative Procedure Act

Five proposed uniform acts which

have received prior consideration by the Conference will also be considered for final approval and, if approved, presented to the House of Delegates for endorsement. These are:

Uniform Death Tax Credit Act

Uniform Nuclear Facilities Liability Act

Uniform Non-Residents Income Tax Deductions Act

Uniform Extra-Territorial Process Act

Uniform Code of Military Justice

One new model act will be considered for final approval:

Model Real Property Lien Priority Act

Three new proposed uniform or model laws will be considered by the Conference for the first time and will not be eligible for final approval. They are:

Uniform Act on Officers Crossing State Lines

Uniform Foreign Money Judgments Recognition Act

Model Power of Attorney Act

The Conference has called these acts to the attention of the Sections, Committees and members of the American Bar Association on numerous prior occasions. Particularly with respect to those acts which will be eligible for final approval in 1961, we earnestly solicit the comments and suggestions of all interested persons and groups. Copies of the drafts of these acts may be obtained by writing Mrs. Frances D. Jones, Executive Secretary, National Conference of Commissioners on Uniform State Laws, American Bar Center, Chicago 37, Illinois. All comments and suggestions with respect to these drafts should be addressed to the respective

chairmen of the drafting committees, whose names and addresses are set forth on the draft.

The drafts which will be available are of course not the final drafts in the form in which they may be promulgated by the Conference. They will be subjected to the scrutiny of the Sections and the Conference as a whole and will undoubtedly come out in a form somewhat different from the present drafts. The substance may be the same or, of course, may be changed by action of the Conference at the meetings.

So that all persons interested may have an opportunity to participate, any representative of an interested Section or Committee of the American Bar Association, or any interested member of the Association, is extended a cordial invitation to be present at the Section meetings on Monday, July 31, 1961, and make known his approval, criticisms or suggestions.

The program of the Conference for consideration of the acts in the Committee of the Whole will be printed in the Advance Program for the American Bar Association Annual Meeting. Here, again, interested persons or groups are invited to attend and may, upon application, be accorded the privileges of the floor to discuss the act being considered.

The Conference extends a cordial invitation to all Sections, Committees and members of the American Bar Association to attend the sessions of the Conference and its Sections at any time, whether or not they are interested in a particular act being considered.

GEORGE R. RICHTER, JR.
President

Our State Bar Associations:

The Ohio State Bar Association

In this issue, we begin a series of articles on the state bar associations of the United States. The series will deal with the history, achievements and future plans of these organizations which play a vital role in the welfare of our profession. It is hoped that the series will reflect the traditions of each of the state bars and document their achievements and problems for the benefit of the entire profession.

THE OHIO STATE Bar Association was born in 1880 when 164 lawyers from forty of the state's eighty-eight counties gathered in Cleveland at the call of the Cleveland Bar Association.

In 1880, Ohio was the center of the thirty-eight United States, literally and figuratively. It is true that the nation's population center had shifted from Ohio to Kentucky in the ten years that had elapsed since the taking of the 1870 census, but it was still only eight miles from Ohio's largest city, Cincinnati.

Cleveland was a small metropolis of 160,000 in those days, still only two thirds the size of her sister city at the other end of the state. The state itself had a population of only 3,198,062, in a nation of 50,155,783. The state was still largely rural—the places that would be great centers of industry before many more years were quiet, sleepy towns, still showing some of the rawness of the frontier which had passed out of Ohio only a generation before. In Akron, population 16,512, the B. F. Goodrich plant was manufacturing fire hose. The horseless carriage, with its voracious appetite for rubber tires, and the plants of Goodyear and Firestone which, along with Goodrich, would make Akron the rubber capital of the world, were still unknown.

In Dayton, a town of less than

39,000, Wilbur and Orville Wright, 13 and 9 years old, were selling homemade mechanical toys to earn pocket money, already displaying the mechanical genius that was to lead them, a quarter of a century later, to demonstrate at Dayton's Huffman Field the successful flying machine that would revolutionize the world.

In Cincinnati, a young man named William Howard Taft had been graduated from Cincinnati Law School that spring—on his way, among other honors, to the White House and John Marshall's old seat on the Supreme Court. Another young man named William McKinley, who had deserted his Canton, Ohio, law practice for politics, was preparing to campaign for his third term in the United States House of Representatives.

Men from the Buckeye State dominated the politics and the policies of the era. The hero of the times, former President Ulysses S. Grant, had been born in Ohio, at Point Pleasant. Rutherford B. Hayes, who had succeeded Grant in the White House in 1877, was another Ohioan, born at Delaware, a few miles north of the state capital, in 1822. James A. Garfield, a native of Orange in Cuyahoga County, had been nominated for the Presidency just five weeks before the lawyers who founded the Ohio State Bar Association met in Cleveland. Garfield went on to win the

election in November, the only time since 1816 that three successive Presidents have been elected from the same state.

The eyes of the nation were focussed on Ohio for another reason that summer—the Democratic National Convention had met in Cincinnati late in June; many of the lawyers who gathered later at Cleveland must have attended the earlier convention in Cincinnati, for then, as now, the Ohio lawyer played a large role in the affairs of his state and nation.

President Hayes had practiced law in Lower Sandusky (now Fremont) and Cincinnati, and two of the members of the United States Supreme Court in 1880 had practiced at the Ohio Bar—including Chief Justice Waite, who had succeeded another Ohioan, Salmon P. Chase, as Chief Justice. Secretary of the Treasury John Sherman had been a member of the Ohio Bar since 1844.

The 164 lawyers who gathered in Cleveland on July 8, 1880, were vigorous, far-sighted men, and they were determined to have an organization that would be worthy of the Ohio lawyers and the people of the state whom those lawyers served.

They succeeded.

The Ohio State Bar Association now

numbers more than 9,000 and includes in its membership more than two thirds of the 13,200 lawyers in the state. It is the third largest voluntary state bar association in the country, and its record of service to the legal profession and the public has kept step with the growth of the State of Ohio.

The Association began with six committees—Admission, Executive, Judicial Administration and Legal Reform, Legal Education, Grievances and Legal Biography. Today it has forty-five committees and sections, including a Committee on Atomic Energy and a Committee on Aviation Law—fields that would probably astonish the 164 charter members if they were suddenly summoned back from their rewards to see their Association in its manhood.

All bar associations have three fundamental purposes: service to the profession, service to the public and the cultivation of the cordial relations among the members of the Bar that are at least as old as the Inns of Court. The achievements of the Ohio State Bar Association during its eighty-one year history show that it has been true to the traditions of the great Ohio lawyers of the past and faithful to the hopes and dreams of its founders.

Service to the Profession

Perhaps the outstanding service to the profession has been the establishment in 1927 of the *Ohio Bar*. This unique publication (published fifty times a year) provides invaluable material to the members of the Ohio State Bar Association that lawyers in other states may well envy. It contains, for example, advance sheets (with the official volume and page numbers) of all Ohio Supreme Court opinions, and these are published just five days after they are handed down. The *Ohio Bar* also contains advance sheets (again with the official volume and page number) of Ohio Appellate opinions, while the Ohio Law Abstract Section sets forth all published lower court opinions in the state. The publication contains a section that lists news of bar association activities, practical articles in all fields of law, Supreme Court news, including a list of new cases and motions filed, merit and motion docket decisions, and oral argument assign-



Matthew J. Smith,
President
of the Ohio State Bar Association



Firestone Photographs

Joseph B. Miller, Jr.,
Secretary-Treasurer
of the Ohio State Bar Association

ments. It also publishes bar examination summaries, paragraph digests of current Ohio propositions of law, syllabi of opinions of the state's Attorney General, and news concerning activities of individual lawyers that is of general interest to the Bar. All this is provided to members of the Association as part of their membership, at no additional cost—a boon that few if any of the lawyers of the other forty-nine states receive from membership in their state bar associations. The association dues also include a subscription to *The Ohio Lawyer*, a six-page monthly tabloid of Association activities and *The Real Property Lawyer*. *The Ohio Practice and Procedure Handbook* is designed for the young lawyer entering practice. The Association also publishes a *Local Bar Association Bulletin* and a *Digest of Ohio Arbitrators*.

The Association offers many other services to its members, including supplying them with information on pending legislation and copies of bills and information on any matters pending before most state agencies. Upon request, it furnishes the facts involved and a synopsis of lower court opinions pending before the Ohio Supreme Court.

It also provides continuing education programs, and the Ohio Practicing Law Institutes are held at least once each year in academic surroundings,

featuring qualified lecturers on subjects of practical interest to lawyers.

The Association was instrumental in securing the passage of legislation permitting the issuance of group life insurance for lawyers, and the Association's own group life insurance plan is now in force. The plan is open to any new member of the Bar without a physical examination and regardless of age. The Association also makes available a health and accident policy for its members.

Public Service

In serving the public, the Ohio State Bar Association has another proud record. It prepared the Ohio Probate Code in 1932. It was instrumental in obtaining passage of the state's 1935 Administrative Procedure Act and was one of the prime forces in successfully urging the Supreme Court of Ohio to adopt the American Bar Association's Canons of Professional and Judicial Ethics in 1952. In 1955, it successfully petitioned the Supreme Court to adopt a rule on professional grievances that greatly improved disciplinary procedure in the state. In 1957, it drafted and obtained passage of a broad revision of Ohio corporation law.

The newest service to the public was the establishment of a Clients' Security Fund on January 1 of this year. The rules of procedure for filing, investigating and settling claims were approved on January 13. Ohio is believed



Stephen Lewellyn

Joseph D. Stecher,
Executive Director
of the American Bar Association

to be the first jurisdiction in the United States to adopt such rules of procedure. Henceforth, clients will be reimbursed for any loss arising from dishonest conduct by members of the Association. The Fund will be administered by a five-man committee. While reimbursements will be strictly a matter of grace, every effort will be made to pay all just claims, regardless of size. The Fund was established because the Association believes that it has a moral obligation to protect the public from larceny or embezzlement on the part of its members. Adoption of the plan is actually a vote of confidence in the legal profession of Ohio; it would be impossible to undertake such an obligation if there were great financial risks.

Perhaps the most revolutionary project of the Association is its plan for judicial reform. On March 2 and 3, the Association sponsored a Conference on Judicial Selection and Tenure, whose purpose was to present a summary of the Ohio political system of judicial selection. More than 850 prominent Ohio citizens were invited.

The Association has submitted a legislative program of more than thirty-three bills to the General Assembly this year. All these measures are aimed at improving the law and the administration of justice.

Organization

The Constitution of the Association



George Dozols Maniatis Studio

Philip C. Ebeling,
Ohio State Delegate
to the House of Delegates

provides for a structure that is familiar to many state bar associations. Fiscal matters and general administrative control are put in the hands of an Executive Committee composed of one member from each of seventeen districts, with the President, Vice President and immediate past President as members *ex officio*. Executive committee members are elected for staggered three-year terms at membership meetings held in the individual districts. The Vice President is elected for a one-year term at the Association's annual meeting, which is usually held in May. The Vice President automatically succeeds to the office of President at the end of one year.

The general policies of the Association, especially on legislative matters, are set by its Council of Delegates,

which has representatives from each of the seventeen districts. The number of delegates from each district is based on the number of members of the Association in the district. At present, there are seventy-eight members of the Council, including the twenty members of the Executive Committee.

The Executive Committee meets at least eleven times a year. The Council meets twice annually, once in November and again during the annual meeting in May. The forty-five Committees and Sections meet at least semi-annually. Registration at annual meetings in recent years has averaged over 1,000. In the earlier days, two general meetings were held annually, one during the winter and another in the summer. The summer meetings were held at Cedar Point on Lake Erie, and many of the older members of the Association cherish pleasant memories of the good times at Cedar Point in those bygone days.

Dues range from \$4.00 for lawyers newly admitted to the Bar to \$25.00 for members who have been at the Bar more than six years. The Association's annual budget is now about \$200,000, and a dues increase to \$35.00 annually for older members will go into effect January 1, 1962.

American Bar Association Activities

Ohio has had one President of the American Bar Association—Howard L. Barkdull, of Cleveland, who served in 1951 and 1952, although the state is perhaps entitled to claim another—William Howard Taft, who served in

Ohio Members of the House of Delegates of the American Bar Association

Howard L. Barkdull, Cleveland, former American Bar Association President and former Chairman of the House of Delegates.

John W. Bebout, Toledo, representing the Ohio State Bar Association.

C. Kenneth Clark, Youngstown, representing the Ohio State Bar Association.

Philip C. Ebeling, Dayton, State Delegate.

John Eckler, Columbus, representing the National Conference of Bar Examiners.

Wendell A. Falsgraf, Cleveland, representing the Cleveland Bar Association.

Earl F. Morris, Columbus, representing the Columbus Bar Association.

William H. Nieman, Cincinnati, representing the Cincinnati Bar Association.

1913-1914, after he left the White House.

Joseph D. Stecher, formerly of Toledo, now the Executive Director of the American Bar Association, is a past President of the Ohio State Bar Association. He also served as Assistant Secretary of the national organization from 1937 to 1945 and as its Secretary from 1945 to 1957.

Many other Ohioans have played prominent roles in the councils of the national organization. Two Ohio lawyers served on the old Executive Committee of the American Bar Association, and since that committee was replaced by the Board of Governors in 1936, six members of the Ohio Bar have served on the Board.

Six Annual Meetings of the American Bar Association have been held in Ohio—four in Cleveland (1897, 1918, 1938 and 1947) and two at Cincinnati (1921 and 1945). Cincinnati was the site of a Regional Meeting in 1955.

The Ohio State Bar Association won the American Bar Association's Award of Merit in 1949 and 1953, and, as a group, Ohio's bar associations, over the life of the Award of Merit competition, have had the highest percentage of winners in the nation—fourteen, including two for Cleveland, one for Lake County, three for Columbus, two for Toledo, two for Akron, one for Stark County and one for Portage County.

The Future

Ohio is known as the "Growth State". It ranks thirty-fifth in land area, fifth in population, eighth in gross value of farm production, and second in manufacturing. The state's bar association reflects this vigor, and in the last ten years, the Association has more than doubled its membership. As a result, the headquarters offices on



Artist's Sketch of the Ohio Legal Center

the third floor of the State House Annex have become hopelessly inadequate for the staff of ten which is crowded into two small rooms.

Late this fall, the Association will move into its new quarters now under construction on the campus of Ohio State University, Columbus. This building will be named the Ohio Legal Center.

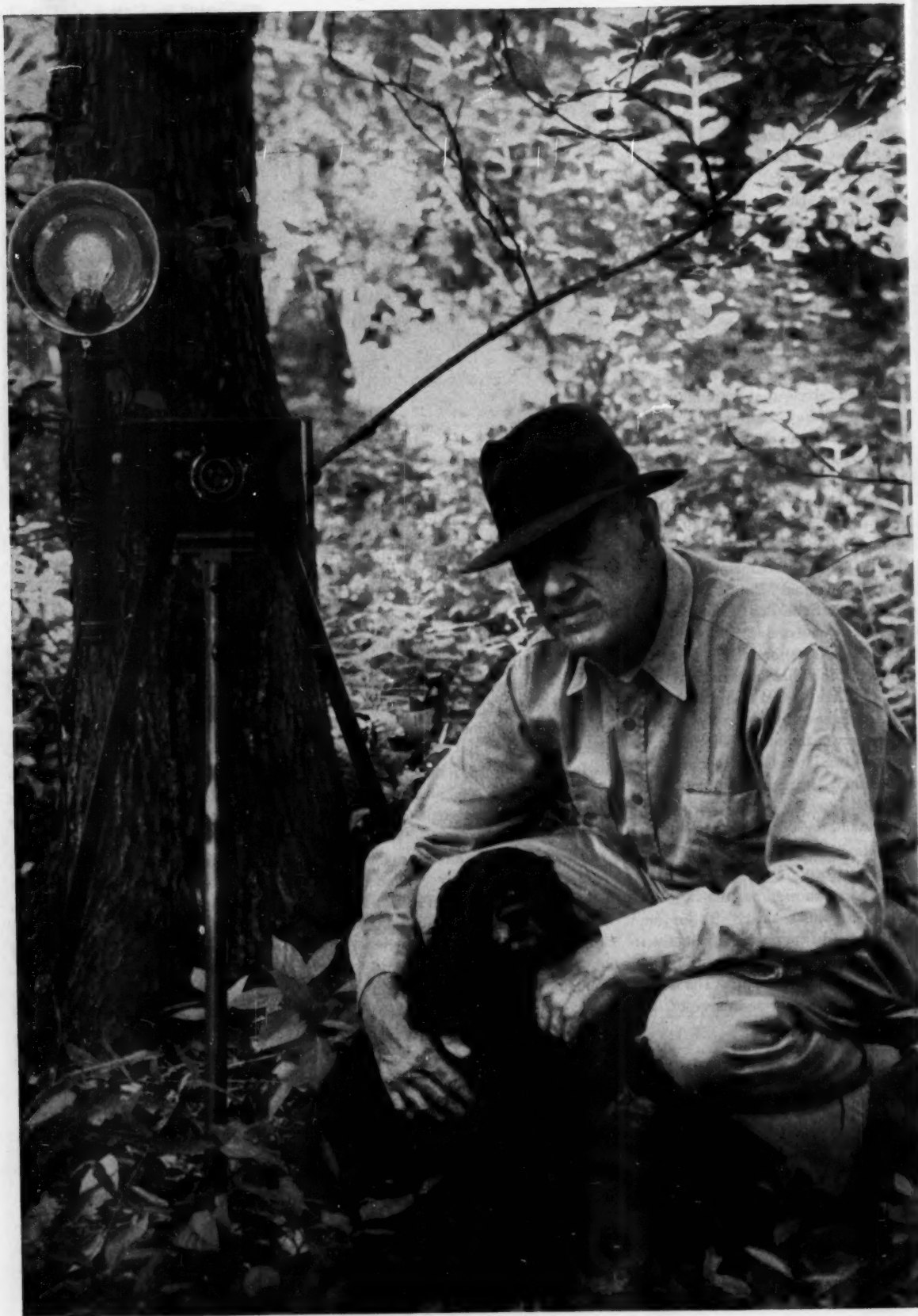
In addition to housing the Ohio State Bar Association headquarters, the modern three-story structure will provide meeting and library facilities for members and will afford facilities for carrying on a greatly expanded program of continuing legal education and research for the benefit of the practicing lawyers, courts and public of the State of Ohio. The new Ohio Legal Center will be close to the recently constructed Ohio State University College of Law and will encompass the latest ideas in physical planning, with the first floor devoted to the reception hall,

association counsel and his staff, library, meeting rooms, the board room and lounge.

The second floor will house the general administrative offices, bookkeeping department and mailing and printing room. The third floor will be devoted entirely to legal education and research.

Funds for this proud symbol of the legal profession were provided by the members of the Association. Total cost of the edifice, including furnishings, is estimated at \$750,000.

Already a leader in the field of services to its members and to the administration of justice in the state, the Ohio State Bar Association will be able to increase greatly both the quantity and quality of those services when it becomes established in the new Ohio Legal Center. Proud of its past record of accomplishment, the Association looks forward with confidence to its greatest years which lie ahead.



Tappan Gregory

AMERICAN BAR ASSOCIATION

Journal

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Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Tappan Gregory, 1886-1961

Tappan Gregory, beloved of his fellow lawyers, died peacefully on the night of April 29, 1961. With him passed an influence on the American Bar Association that can never be replaced. Lawyers more than laws were his life.

It is often said that legal history cannot be written, that biographies of great lawyers convey nothing more than the words that they have used in the argument of their great cases because lawyers leave nothing else of themselves. Here, however, was a lawyer whose greatness appeared in his relations with the members of the profession that he loved. He came naturally by this talent for fraternity with the organized Bar. For eighty years, since his grandfather, J. C. Gregory, joined the American Bar Association in 1881, a Gregory has been a member. In 1911, his father, Stephen S. Gregory, became President of the American Bar Association after having been President of the Chicago and Illinois State Bar Associations. In 1947, Tappan Gregory himself became President of the American Bar Association after having been President of the Chicago and Illinois State Bar Associations. So perfect was his sympathy with the American lawyer that his conduct of the office of President of the Association was less direction by him of the affairs of the organization than

transmission of the wishes and thoughts of the rank and file of the membership. To the staff as well, he seemed to be working with them rather than causing them to work for him.

The same attitude characterized his conduct of the office of Editor-in-Chief of the *American Bar Association Journal* to which, again following the footsteps of his father, he was elected in 1948. Behind his modesty, however, there lay principles of uncompromising excellence, fair play and loyalty from which even his sympathetic nature would not permit departure. His willingness to accept criticism and to listen to the views of others brought out the best in the Associate Editors and, while it would be hard to say that the collaboration which he inspired resulted in a better publication than if he had guided it with his own hand alone, the result was more nearly the voice of the Bar.

In occupying the place on the Board of Governors that he held *ex officio* as Editor-in-Chief he rarely cast a vote. He felt that only those who had been elected to office were entitled to direct the affairs of the Association and he almost always limited his voting to such matters as concerned the *Journal*.

Next to his instinct for pleasant and productive association with his brethren of the Bar, the strongest urge of his nature was that exemplified by his wild animal photography and his presidency of the Izaak Walton League and his vice presidency of the Chicago Zoological Society. His great store of affection for his fellow creatures sufficed to encompass us all, with plenty left over for *Deer at Night in North Woods* (1920), *Mammals of the Chicago Region* (1936) and *Eyes in the Night* (1939).

What must never be forgotten is the influence for good of this quiet gentleman who year after year at Annual and Midyear Meetings attracted the "Gregorian Knights" to the suite that he occupied first with Stephen Hurley and then after the latter's death with other kindred spirits. What wife and children mean to most of us, the American lawyer meant to him. Of late years ill health must have made what used to be unalloyed pleasure into a task, but that warm welcoming smile never failed to greet a fellow follower of St. Ives. All of us are the better for his patronage of our cause.

A New President for the American Law Institute

When the American Law Institute inaugurates a president it is news. Since the founding in 1923 there have been only three: George W. Wickersham until his death in 1936, George Wharton Pepper until 1947 and Harrison Tweed until this year. There have been only two directors, William Draper Lewis until 1947 and the present director Circuit Judge Herbert F. Goodrich. In an organization with less accomplishment, such long incumbencies would indicate somnolence, but with the A.L.I. they represent steadfastness of purpose and wise choice of means for accomplishing it.

The new president, Norris Darrell, will find himself in command of power which has gained such impetus over the past as to be akin to a natural force in the American legal world. In Washington, on February 23, 1923, a

committee of lawyers, headed by Elihu Root, submitted to a meeting of representative judges, lawyers and law teachers a document entitled "Report of the Committee on the Establishment of a Permanent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute". George W. Wickersham was vice chairman, and among the thirty-nine members of the Committee were Joseph H. Beale, Charles C. Burlingham, Benjamin N. Cardozo, John W. Davis, Learned Hand, John G. Milburn, Harlan F. Stone, Henry W. Taft, John H. Wigmore and Samuel Williston. William Draper Lewis was secretary.

As a result of the meeting to which the report was submitted, William Howard Taft, Charles Evans Hughes, Elihu Root and others acted as incorporators of The American Law Institute under a certificate providing that its purposes are "educational and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work".

In carrying out these purposes, the Institute has gone far and wide. It is best known for its *Restatements*, of which the total number of 403,548 have been sold and which have been cited by the courts in 29,554 instances. The Institute is now bringing out a second edition of each of the nine subjects. A *Restatement* now being made for the first time is on the subject of "The Foreign Relations Law of the United States". In addition to the *Restatements* the Institute has drafted legislation that left the advocacy of its adoption to others. It has produced a Uniform Commercial Code which, under the sponsorship of the Commissioners on Uniform State Laws, has been adopted in Pennsylvania, Massachusetts, Ohio and seven other states. It has prepared a Model Federal Income Tax Statute and amendments to the Gift and Estate Tax Statutes and has published supplemental studies in taxation particularly with respect to capital gains. A Model Code of Evidence has been produced. For the last ten years, work has been done on a monumental Model Penal Code. In 1940 the Institute completed the Youth Correction Authority Act which has been adopted in modified form in the statutes of five states and the Federal Government and which has been called the forerunner in an enlightened approach to the problem of juvenile delinquency.

In 1947, the Institute entered the field of continuing legal education under an agreement with the American Bar Association which involved the creation of a Joint Committee. The Joint Committee publishes handbooks on forty-three subjects of concern to practicing lawyers and since its inception has sold 285,000 copies. Under its auspices *The Practical Lawyer* is produced and so successfully that it operates at a profit sufficient to cover a substantial part of

the deficit incurred in the operation of other educational activities of the Joint Committee. The Committee arranges for programs of instruction known as "institutes" which have been attended by thousands of lawyers.

Except for an endowment for the continuation of the *Restatements* given by the A. W. Mellon Educational and Charitable Trust, the Institute operates on the basis of special grants for special projects and has received such grants from the Falk Foundation, the Ford Foundation, the Rockefeller Foundation and, for the initiation of the first *Restatements*, the Carnegie Corporation.

The American Law Institute has a total countrywide membership of 1,500. Attendance at the annual meetings in Washington is required and repeated failure to attend is cause for severance of the relationship. At the annual meetings the current work of reporters, after having been considered by a council of forty-two members, is submitted to the assembled lawyers for discussion and adoption, amendment or rejection. These meetings are the occasions for as brilliant a display of legal talent as the American scene affords. With only one exception each one of these meetings has been opened by an address by the Chief Justice of the United States who makes it the occasion for a report on the work of the federal judicial system.

The success of the A.L.I. has been largely due to the genius of its presidents. Attorney General Wickersham was the very embodiment of the spirit of the giants of his day like Elihu Root. No one has ever exceeded Senator Pepper for a combination of wisdom, urbanity and leadership. Harrison Tweed has taken his inspiration from them and passes it on with even more breathed into it from his own store of learning, ability and good fellowship.

Norris Darrell who falls heir to the blessings and burdens of this tradition is a member of the Council of the Institute and a former Vice President of the Practising Law Institute of New York and of The Association of the Bar of the City of New York. He is a graduate of the University of Minnesota Law School and served as law clerk to Mr. Justice Butler of the United States Supreme Court. He was admitted to the New York Bar in 1927 and is a member of a New York City law firm. Prior to becoming a member of that firm he was engaged in general practice but has since tended more and more to specialize in the tax field. He has served on many tax advisory committees both to the Federal and New York State Governments and has been active in the American Bar Association's Section of Taxation. For two years he represented his firm in Paris and Berlin and still retains trans-Atlantic connections so that he brings to his new office extreme breadth of experience.

The *Journal* wishes him well in guiding one of the most important and fruitful undertakings of the legal world.

American Lawyers Give Books to India

The announcement of the Special Committee on World Peace Through Law that the first of the Continental Conferences of Lawyers will be held in Costa Rica in June, 1961, suggests that American Bar Association members may be interested in an event that followed the International Congress of Jurists held at New Delhi in January, 1959.

The International Congress of Jurists, consisting of 185 judges, practicing lawyers and teachers of law from fifty-three countries met in New Delhi in January, 1959, under the aegis of the International Commission of Jurists. In the Declaration of Delhi adopted by the Congress on January 10, 1959, the Congress stated that it

Reaffirms the principles expressed in the Act of Athens adopted by the International Congress of Jurists in June 1955, particularly that an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;

Recognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized...

On their return from the Congress the lawyers from the United States felt that they should record in some permanent and useful fashion their apprecia-

tion of the kindness and hospitality of their Indian hosts. A number of them had visited the Supreme Court of India and had seen its excellent library, and it occurred to them that an addition to the American collection would be a suitable expression of their gratitude. Accordingly, Vivian Bose, President of the International Commission of Jurists and a former Justice of the Supreme Court of India, and Ambassador Ellsworth Bunker were asked to say to the Chief Justice of India that with his approval such a presentation would be made. Following his favorable reply lists of titles suggested and titles already possessed by the library were exchanged, with the result that by April, 1960, the books had been received at the American Embassy. On April 4 they were presented at a ceremony in the Supreme Court Library attended by the members of the Court, leaders of the Bar and members of the Indian Government and Parliament.

Speech of Mr. Justice Vivian Bose

I am here in a triple capacity. Firstly, I am here as a representative of the donors of the books that are about to be presented to your Lordships. They are unfortunately not able to be here today and have asked me to represent them, and have also asked me to say that four volumes have not yet arrived but are on their way.

Secondly, I am here as President of the International Commission of Jurists, a body that represents not only

the donors but also over 65,000 jurists belonging to some fifty-six countries of the world.

And thirdly, I am here as an Indian jurist who believes in the rule of law and who believes that there can be no peace among nations or justice for individuals until peoples and nations learn to agree upon, to accept, to establish and to obey a rule of law throughout the world and to bow to it and enforce it, not only on the various national planes but also internationally.

The International Commission of Jurists is dedicated to that purpose, and in order to achieve it, it holds congresses of jurists at intervals of four or five years in different parts of the world and calls together for common consultation judges and jurists and lawyers and teachers of law and the makers of laws from all over the world. One of these congresses was held at Delhi in January, 1959. Among the very distinguished persons who attended it were an eminent body of judges and lawyers from the United States of America. They are the donors of these books...

The American members of the Delhi Congress, as indeed was everybody else, were deeply impressed by the friendliness and hospitality of the judges and lawyers of India to their brothers-in-law from other lands. They were even more impressed by the solid foundations that have been laid for the continued maintenance of a long-established rule of law in India; and for the

robust independence, sincerity and devotion with which Indian judges and lawyers strive to maintain and enforce its basic principles in an atmosphere that permits the utmost freedom of discussion and criticism and yet maintains the dignity of the individual. The generous donors of these books feel, as does the distinguished body of jurists to which I have the honor to belong, that good will and understanding between the lawyers of the world will go a long way towards achieving the ends that they and we have in view.

These donors were glad that they visited India and they hope that the lawyers of India and other jurists in this land will visit their country and see how the rule of law works there; and I, as president of the international body, hope that there will be many visits not only between India and the United States but between all countries; and that lawyers from abroad will flock not only to India but everywhere, and that the lawyers of India will also spread themselves around the world and increasingly multiply their visits abroad—ambassadors, not only of good will, but messengers to proclaim the benefits and glory of a universal rule of law among all the nations of the earth.

And now, may I step down from the international plane and resume my basic role, that of an Indian deeply appreciative of this generous gesture—generous materially, because some of the books are rare books that are not easily obtainable and will enrich your Lordships' library; but generous also spiritually, because it represents the efforts of busy men to offer something of themselves to the judges and jurists and lawyers of India in this graceful gesture that is the outward and visible token of a deep inward appreciation. May I, therefore, as a simple citizen of this land, and on my own personal behalf, say to them and to Your Excellency, who has so very kindly consented to grace this occasion and present the books, two simple words pregnant with deep meaning: thank you.

Remarks by Ambassador Bunker

Mr. Justice Bose has told you of the nature of the presentation I am to



United States Ambassador Ellsworth Bunker presents to the Chief Justice of India the law books given by American lawyers to the Supreme Court of India.

make today to the Library of the Supreme Court of India. I am glad that my fellow Americans who were here last year for the Congress of the International Commission of Jurists have seen fit to provide these books for the use of their Indian colleagues.

Exchanges of all kinds have become important in the interdependent world in which we now live. I am glad that Mr. Justice Bose has suggested that more lawyers should try to visit their brother lawyers in other lands. Such exchanges are already being made among students, professors, scientists, farmers, technicians, journalists and specialists of all sorts.

In my travels about India I have been pleased to see in law libraries the journals of many American state bar associations, other American legal publications and American books on technical aspects of the law. I hope that this gift which your American colleagues of the International Association of Jurists have made also will be useful to you and adds to your knowledge of the law and the courts of the United States.

As a layman, it may seem presumptuous of me to speak to you of the role of the rule of law. You have been concerned with it during your adult lifetimes while I have been concerned with other things. However, I can, I

think, tell you as a representative of the United States of my country's desire to see the rule of law encompassing all men equally, whatever their nation, race or creed. A distinguished American jurist, my friend of many years, Judge Learned Hand, once said, "The law is no more than the formal expression of that tolerable compromise that we call justice, without which the rule of the tooth and claw must prevail." The "rule of the tooth and claw" unfortunately still does prevail in parts of the world. We of the United States and you in India and all those in other lands who strive for the paramountcy of the rule of law deplore it and oppose it and eventually, I feel, we will prevail.

The International Commission of Jurists, of which your distinguished former colleague, Justice Bose, is now president, is dedicated to that proposition—as he has just stated so eloquently, and as set forth in the Declaration of Delhi of January 10, 1959.

We in America are deeply indebted to the law. The philosophers of our Revolution—Jefferson, Adams, Madison and others—all were lawyers. Our Declaration of Independence, itself might be described as a legal brief putting before the court of world opin-

ion the reasons why the Colonies should be free.

You of the Bar know the importance of the courts in our Government. They comprise one of the three pillars on which our whole structure rests, the others being the Executive and the Legislative.

Here in India respect for the rule of law and your independent judiciary are as strong a pillar for free India. May they long endure.

It gives me great pleasure therefore to make this presentation to His Lordship, the Chief Justice of India. I hope that these books may prove a useful gift and that their possession may contribute to the growth of understanding and mutual friendship between our two countries.

Speech of the Chief Justice of India

I have great pleasure in accepting this gift from the American lawyers who attended the International Congress of Jurists at New Delhi in January, 1959. It is my duty, on behalf of the court, to acknowledge with grateful thanks the receipt of the set of valuable books presented by the generous

donors. Apart from the intrinsic value of the books presented, I take the present as a token of good will and friendship of the American lawyers to the judges and lawyers of India. In civilized countries—and I take it that most of the countries of this world, without reference to the new worlds we are threatening to discover and populate, if they are not already as overpopulated as ours is, are civilized—all lawyers are “learned friends” to one another, irrespective of geographical or other barriers. Those lawyers who are prepared to undertake the further responsibilities of serving as judges, become “brothers” to one another. In that sense all lawyers, whether they are practicing at the Bar or are sitting on the Bench, are paving the way to a world friendship and brotherhood, before a one-world government has become a practical ideal.

We are sure these books will be a valuable addition to our library and will be of great use to the court. Our library is still in its formative stage and can never be too full when we know that every day we are adding to our legal lore. We are exploring new fields in the legal world, and our re-

searches are making steady progress, particularly in those branches of jurisprudence which are of recent growth.

Some of the volumes that form a part of the gift will help those inclined to make further search into the past for fresh guidance of lawyers and jurists of the present, so that they may plan for the future. Lawyers and jurists of the civilized world look forward to the time when they will have evolved a universal code of human conduct which will pave the way for the rule of law on a universal scale, when war will be outlawed and co-operation will replace competition, to the lasting good of humanity at large.

From the volumes presented to us it would appear that quite a good number of them relate to the working of the Supreme Court of the U.S.A. and to the life and work of some of the distinguished judges of that august body. I am sure that those volumes will inspire lawyers and judges in this court also.

With these few words I accept the valuable gift to this court in the hope that they will serve a very useful purpose.

Make Your Hotel Reservations Now!

The Eighty-Fourth Annual Meeting of the American Bar Association will be held in St. Louis, Missouri, August 7-11, 1961.

The December, 1960, issue of the *Journal* carries a complete announcement with respect to hotels, registration, etc., and in requesting accommodations please use the hotel reservation application therein provided.

Attention is called to the fact that many interesting and worthwhile events

of the meeting will take place on Sunday, August 6, preceding the opening sessions of the Assembly and the House of Delegates on Monday, August 7.

Requests for hotel reservations should be addressed to the Meetings Department, American Bar Association, 1155 East 60th Street, Chicago 37, Illinois, and must be accompanied by payment of the \$25.00 registration fee for each member for whom a reservation is requested. (The fee for members of the Junior Bar Conference is

\$20.00.) This fee is NOT a deposit on hotel accommodations but is used to help defray expenses for services rendered in connection with the meeting.

Be sure to indicate three choices of hotels, type of accommodations desired and by whom you will be accompanied. We must also have definite dates of arrival and departure.

All space at the Bel Air Motel, Chase-Park Plaza (Headquarters), Diplomat Motel, Forest Park, Gatesworth and Sheraton-Jefferson Hotels is exhausted.

Buying a Home: Representing the Purchaser

There are, as any lawyer knows, many legal considerations in purchasing real estate, and even experienced lawyers can make some very embarrassing mistakes. Mr. Friedman discusses the whole problem in this article.

by Milton R. Friedman • of the New York Bar (New York City)

IN CONSIDERING closing title to a home—or to any other kind of property—we concentrate not on the closing, but on the contract of sale. The closing merely carries out the terms of the contract. It is, of course, possible for the buyer's lawyer to slip up badly because of something coming up at the closing. But he is more likely to be trapped by something in the contract than by anything which is apt to occur at the closing.

Binders

Before considering the usual contract of sale, some consideration must be given to binders, memoranda and incomplete contracts of sale because, unfortunately, it is with these that so many of our transactions begin. These instruments are usually prepared by non-lawyers. ("As is the case with so many such disputes, the agreement of sale was drawn by a real estate salesman." *Brudvig v. Renner*, 172 Cal. App. 2d 522, 523, 342 P. 2d 276, 277 (1959).) When they are enforceable as contracts they are apt to bind a party before he can either think twice about a proposal or see his lawyer. Sometimes they are enforceable, sometimes they are not, and often they are so doubtful that nobody can tell whether they are enforceable before running up and down the courts. Even when they are enforceable they are not satisfactory because they cover so few

of the points which ought to be covered in a well-drawn contract of sale.

A binder qualifies as an enforceable contract if it includes the essential terms of an agreement, i.e. (1) the parties; (2) the subject matter; (3) the mutual promises; and (4) the price and consideration.¹ Of these, the parties and the mutual promises rarely give trouble because even an amateur draftsman is not likely to omit the names of the parties;² and if the memorandum obligates one party to purchase, a promise to sell will be implied.³ Fatal defects in the binder are apt to be found in a failure to identify the property or to set forth the terms of payment.

The property must be described with reasonable certainty. This requirement does not appear in the Statute of Frauds but is judge-made law. Identification of the property by its legal description avoids any doubt of en-

forcement of the contract on this ground. This is generally true of the formal contract prepared by a lawyer. But in a binder we are apt to encounter makeshift descriptions, which have resulted in considerable litigation. A reference to "the house now occupied by the Seller" or to the "Joe Shelby Farm" may be more particularly established by parol evidence,⁴ but generally not if Joe owns two farms.⁵ A description by street number is generally upheld,⁶ but not always.⁷ It is generally said a description is sufficient if it identifies the premises or supplies the "key" to identification, and that parol evidence is admissible not to add to or vary the description but to identify the premises where there is a basis for this in the description.⁸ The difficulty of applying this rule to specific situations is illustrated by a hundred-page annotation.⁹ Even if a description fulfills the minimum requirements

1. *Morgan v. Hemphill*, 97 Ga. App. 613, 105 S.E. 2d 580 (1958); *Ray v. Wooster*, 270 S.W. 2d 743 (Mo. 1954); Friedman, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* (1954) (hereafter cited as Friedman) §2 (Ann. Suppl.) note 11d.

2. This should be qualified. Where property is owned by husband and wife, omission of one spouse from the contract is not unusual. This occurs also in formal contracts.

3. *Stamato v. Agamie*, 24 N. J. 309, 131 A. 2d 745 (1957).

4. *Anderson v. Hall*, 188 S.W. 79 (Mo. 1916); *Marks v. Cowdin*, 226 N. Y. 138, 143, 123 N.E. 139, 140 (1919); *Suchan v. Swope*, 357 Pa. 16, 53 A. 2d 116 (1947).

5. *Roberts v. Lebrun*, 113 Cal. App. 2d 712, 248 P. 2d 810 (1952); *Hummel v. Cruikshank*, 280 App. Div. 47, 111 N.Y.S. 2d 122 (3d Dept. 1952).

6. *Ray v. Robben*, 225 Ark. 824, 285 S.W. 2d

907 (1956); and see *McDermott v. Reiter*, 279 Pa. 545, 548, 124 Atl. 187, 188-189 (1924); 23 A.L.R. 2d 6, 39 (1952).

7. Washington requires a legal description. *Martin v. Seigel*, 35 Wash. 2d 223, 212 P. 2d 107, 23 A.L.R. 2d 1 (1949); and see *Maryland State Housing Co. v. Fish*, 208 Md. 331, 118 A. 2d 491 (1955) (double house); 23 A.L.R. 2d 6, 39 (1952).

8. *Corona Unified School District of Riverside County v. Vejar*, 165 Cal. App. 2d 561, 332 P. 2d 294 (1958); *Suchan v. Swope*, 357 Pa. 16, 20, 53 A. 2d 116, 118 (1947); Friedman, §2, page 4 et seq. (1954) and Supplement; 37 C.J.S. 674; 91 C.J.S. 889, 49 Am. Jur. 134, 658. A defective description may be deemed cured where the vendee has been put in possession. *Keepers v. Yocum*, 84 Kan. 554, 114 Pac. 1063 (1911); 91 C.J.S. 892; Ann. Cas. 1912 A. 748. Contra: *Roberts v. Lebrun*, 113 Cal. App. 2d 712, 248 P. 2d 810 (1952).

9. 23 A.L.R. 2d 6 (1952).

of enforceability it is insufficient to assure the buyer he will obtain property of any particular size or dimension.

It might appear that a statement of the purchase price should create no difficulty. But a price of \$12,000 "subject to a mortgage of \$5,000" has resulted in at least two lawsuits on whether the recited price was over and above the existing mortgage, i.e., whether the cost to the purchaser was \$12,000 or \$17,000.¹⁰

The majority of the binders which are unenforceable are probably defective for failing to state the terms of payment. Frequently, these are not only not stated but not even determined. They thus run into the rule that there can be no enforceable agreement if a material element has been left for future negotiations.¹¹ A reference to \$85,000, payable "as per terms agreed" indicates the existence of terms orally agreed but unincorporated in the writing. This is fatal to a contention that the writing is a sufficient memorandum to satisfy the Statute of Frauds.¹² Assume a proposed sale for \$25,000, \$5,000 of which is payable in cash and \$20,000 by purchase money mortgage. If the \$5,000 is payable in part on signing the contract and the balance on delivery of the deed, in amounts to be agreed, the contract is too indefinite to be enforceable. Nor is there any basis for inferring the missing terms.¹³ But the failure to mention a down payment is not necessarily fatal to the contract. *Felli v. Craft*, 21 Misc. 2d 883, 190 N.Y.S. 2d 238 (Sup. Ct. 1959). There is no requirement that there be a down payment. If in this situation the cash payments were sufficiently specific the binder might, nevertheless, founder on

the purchase money mortgage. The fact that the contract does not provide for the usual terms of a mortgage in local use—such as a covenant to pay taxes or to supply insurance—is insufficient to make it unenforceable.¹⁴ New York has held that a purchase-money mortgage, provided for in a memorandum of sale, without specification of its maturity, is payable on demand.¹⁵ But this is the minority rule.¹⁶ And it is not applied in New York when the papers negative any intention of a demand obligation.¹⁷ Agreements are fatally defective which leave for future determination the payment of interest and amortizations¹⁸ or the maturity of the mortgage.¹⁹ The same would, of course, apply where the amount of the mortgage has been left indefinite.²⁰ There is some authority to the effect that a failure to specify interest and maturity is immaterial where a mortgage loan from a third person is contemplated.²¹ Other cases refuse to recognize a contract as complete where details of third-party financing remain open.²²

If the essential recitals are present and the Statute of Frauds is complied with, it is immaterial that the contract or memo consists of several instruments construed together, an exchange of letters or telegrams or even a check with a proper notation thereon.²³ But there may be a question then if there is an offer and acceptance, or merely an unaccepted counteroffer. One illustration should be sufficient. Suppose the last paper reads: "I accept provided title is marketable." Buyer is entitled to a marketable title by implication.²⁴ Hence, no new condition has been injected and the acceptance is unconditional.²⁵ But suppose the last paper reads: "I accept if title is satis-

factory." This should be an unconditional acceptance in those jurisdictions where "satisfactory title" is equated with marketable title, but not elsewhere.²⁶ Where both parties have signed the same paper the basic question is: Did the parties agree on the essential terms of a contract? Where they signed different papers there is a second question: Did the parties agree on the same things?

A binder may indicate that the parties contemplate entering into a formal contract. But this is not sufficient in itself to make unenforceable a binder which includes the essential recitals and complies with the Statute of Frauds.²⁷ A provision that the parties are not to be bound until a formal contract will be given effect.²⁸ But in many cases it is most difficult to fathom the parties' intentions. An acceptance of an offer, subject to "details to be worked out", has been held insufficient to negative the existence of a completed contract.²⁹

The matters hereinabove considered rarely come up when the contract is prepared by a lawyer and patterned after the forms in local use. The contract may take the form of a bilateral agreement between seller and buyer. Sometimes an instrument with substantially the same provisions is in the form of an offer, which is signed and submitted by purchaser, a copy of which comes back with seller's "accepted". Or it may be an "Agent's Deposit Receipt" signed also by a broker to acknowledge receipt by him of a down payment.³⁰ In some localities it is customary for purchaser's down payment to be made to a third party in escrow, whereas in others it is usually, but not always, made directly to the seller. Variations in local

10. Compare *Didrikson v. Havens*, 136 Conn. 41, 68 A. 2d 163 (1949) with *Williams v. Manchester Building Supply Co.*, 213 Ga. 99, 97 S.E. 2d 129 (1957). For a similar reason a contract requiring purchaser to "assume" existing assessments was held ambiguous. *Wright v. Lowe*, 140 Cal. App. 2d 891, 296 P. 2d 34 (1956).

11. 1 Williston, *Contracts* §45, page 131 (rev. ed. 1936).

12. *Roberts v. Adams*, 164 Cal. App. 2d 312, 330 P. 2d 900 (1958); *Blageter v. Keller*, 122 Misc. 705, 203 N. Y. Supp. 627 *affd.*, 214 App. Div. 758, 209 N. Y. Supp. 797 (4th Dept. 1925). The *Blageter* case was distinguished in *Johnson v. Edmunds*, 197 Misc. 959, 99 N.Y.S. 2d 68 (Sup. Ct. 1950) where the phrase "Price to be \$16,800 as per terms agreed" was held sufficient, and deemed to refer to the price of the land in question.

13. *Ansoorge v. Kane*, 244 N. Y. 395, 155 N.E. 683 (1927).

14. *Baker v. Dawson*, 216 Md. 478, 492, 141 A.

2d 157, 165 (1958); 60 A.L.R. 2d 251, 262 *et seq.* (1958).

15. *Ansoorge v. Kane*, 244 N. Y. 395, 155 N.E. 683 (1927).

16. See *Sweeting v. Campbell*, 8 Ill. 2d 54, 132 N.E. 2d 253; 60 A.L.R. 2d 251, 268, 272 (1958).

17. A provision for release of individual lots from the lien of a purchase money mortgage was held to negative any intention to make mortgage payable on demand. *Israelson v. Bradley*, 285 App. Div. 971, 139 N.Y.S. 2d 913 (2d Dept. 1955). It was so held where the mortgage was to be payable in installments, but with no indication of their amount and duration. *Monaco v. Levy*, 209 N.Y.S. 2d 555 (2d Dept. 1961).

18. *Willmott v. Giarraputo*, 5 N. Y. 2d 250, 157 N.E. 2d 232 (1959); 60 A.L.R. 2d 251, 265 (1958).

19. *Sweeting v. Campbell*, 8 Ill. 2d 54, 132 N.E. 2d 253; 60 A.L.R. 2d 247 (1958).

20. 60 A.L.R. 2d 251, 276-278 (1958).

21. *Kenner v. Edwards Realty & Finance Co.*, 204 Wis. 575, 236 N.W. 597 (1931).

22. *Cole v. Cutler*, 96 Ga. App. 891, 102 S.E. 2d 82 (1958); *Smith v. Biddle*, 188 Md. 315, 52 A. 2d 473 (1947).

23. *Friedman*, §2, page 3.

24. *Friedman*, §21; 4 AMERICAN LAW OF PROPERTY §18.7 (1952); 92 C.J.S. 13.

25. *Friedman*, §2, at note 21e; 1 Corbin, *CONTRACTS* §86 (1950); 1 Williston, *CONTRACTS* §78 (rev. ed. 1936).

26. *Friedman*, §2 at notes 21f-21h.

27. *Friedman*, §2 at note 10; 1 Corbin, *CONTRACTS* §30, 61 (1950); *CONTRACTS RESTATEMENT* §26; 17 C.J.S. 331.

28. *Belbird Realty Corp. v. Wolfson*, 221 App. Div. 67, 222 N. Y. Supp. 659, *affd.*, 248 N. Y. 615, 162 N.E. 547 (1928).

29. *Carver v. Britt*, 241 N. C. 538, 85 S.E. 2d 888 (1955).

30. *Nakatsukasa v. Wade*, 128 Cal. App. 2d 86, 274 P. 2d 918 (1954); *Koepeke Sayless & Co. v. Lustig*, 135 Wash. 70, 283 Pac. 458 (1929).

law will, of course, require differences in the contract. What may be a lien in one place may not be in another. There may be local conveyance taxes.³¹ The risk of loss varies in considerable detail among the states.³² Nevertheless, there is sufficient similarity in the basic terms of a contract as one crosses state lines to permit consideration of the terms of a typical contract.

Formal Contracts of Sale

The typical contract begins with the name of the seller. Suppose seller's wife has an interest in the property—possibly by way of dower or tenancy by the entirety—but does not sign the contract. The purchaser has no assurance of getting the property unless she does. But the purchaser generally may not repudiate the contract, because the wife may ratify the contract and execute the deed with her husband at the time provided for its delivery. In effect, she has an option.³³ Accordingly, the purchaser should learn if the wife has an interest and, if so, obtain her signature to the contract.

If a down payment is made to the seller, the purchaser has a vendee's lien for its amount, that is, if the seller owns the property.³⁴ If the recited seller is not the owner there is no basis for a vendee's lien. It would be comforting in many cases to make the down payment in escrow—perhaps to the seller's lawyer. But where this is not the custom any such proposal may run into substantial resistance.

The next item is the purchaser's name. It is common to take title to a home in the name of husband and wife. In most states a conveyance to "John Smith and Mary Smith, his wife", creates a tenancy by the entirety, with the result that on the death of one spouse title passes immediately to the surviving spouse without delay—not even the delay that may be involved if the property were left outright to the survivor under a will. In Connecticut there is no tenancy by the entirety, but the same result has long been accomplished there by a survivorship deed. (See Stephenson, "Survivorship Deeds Under the Statute", 34 *Conn. B. J.* 15 (1960) and authorities there cited. The practice is provided for by Conn. Gen. Stats. (1958)

(Suppl.) §§47-14a to 47-14k which went into effect in 1959.) The estate planners tell us there is too much tenancy by the entirety—it puts estate planning into a straight jacket; a trust permits more and better maneuvering, and that once a tenancy by the entirety has been created it cannot be unravelled—as by conveying the entire interest to one spouse—without involving a question of gift tax. But they generally agree, nevertheless, that in the case of a home and moderate bank account a survivorship arrangement is desirable.³⁵

Next in the typical contract is a blank for a description of the premises. The description determines whether the buyer will get the property he has in mind; and at this point his attorney can determine that if the buyer does get the property he wants, it will not be a matter of luck. This is not always easy to check.

In most of New York County it is not difficult. The avenues run substantially north and south and the numbered streets east and west, and Fifth Avenue divides the east and west sides. 1 West 50th Street is at the northwest corner of 50th Street and Fifth Avenue; 1 East 50th Street is the opposite, or northeast, corner. A parcel of land beginning on the north side of Fifth Avenue, 50 feet east of the northeast corner of 50th Street and Fifth Avenue, running thence easterly along the northerly side of 50th Street 75 feet to a point, thence northerly, at right angles to 50th Street, a distance of 100 feet to a point, etc., is simple to follow.

If the property is described as "Lot No. 2 on the Map of Hollyhocks Development, filed as Map No. 360 in —", ask the seller for a copy of the map. If this is one of a group of houses in a new development, all of which will probably be mortgaged—if not, they will probably not be sold—there may be a survey of each lot in existence, with a legend "Lot No. 2 on the Map of Hollyhocks, ..." etc., which should make checking easy.

Country descriptions offer the most difficulty, as for instance, one beginning "at the southeast corner of the land hereby described", which then proceeds "northerly to the southeast corner of property conveyed to Jones



New York Times

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by deed recorded in Book 14, page 1, thence westerly..." etc. The writer often encounters this type of description in representing a client which acquires business sites in rural areas. In this situation the client supplies a plot plan which identifies the property and is attached to the contract as an exhibit. The contract refers to the premises as "the property shown on the attached plan..." The contract also provides that the buyer shall procure a survey and that the seller will convey by a metes and bounds description prepared from such survey.

It is frequent for the description to be followed by a paragraph of two or three lines reading substantially: "Being the same premises conveyed to the Seller by deed recorded in Book 50,

31. For local conveyance taxes, see Friedman, 188, at note 64-64e; Shetman, *MORTGAGE AND INVESTMENT GUIDE* 305 A et seq. (1960); and see MARTINDALE-HUBBELL LAW DIRECTORY, Volume on Law Digests, heading "Deeds" under the various states.

32. See page 602, *infra*.
33. 6 Corbin, *CONTRACTS* §1259, page 24; Friedman §17, 36, Supp.

34. *Elterman v. Hyman*, 192 N. Y. 113, 84 N.E. 937 (1908); 45 A.L.R. 352 (1926); 33 A.L.R. 2d 1384 (1954); 92 C.J.S. 574.

35. For a good discussion, see Mann, *Joint Tenancies Today*, 1956 *ILL. L. FORUM* 48.

page 70". If the purchaser has had trouble in following a description that is in front of him this trouble is not dissipated by incorporation by reference of a second description about which he knows even less. This clause is useful for title examiners, where the grantor-grantee system of recordation is in use, in beginning their search. It may also be very helpful in avoiding the effect of an error or omission in a description.³⁶ It has been frequently held that the clause neither adds to nor extends a description.³⁷ But this clause has also been held to enlarge or diminish the property conveyed. The numerous cases in point cannot be reconciled. One in New York held that the fact that the prior deed conveyed only an undivided half interest cut down the later conveyance to a half interest.³⁸ It is the writer's conclusion that unless the jurisdiction in question has clearly held that this clause is without effect, except to indicate the source of title, a purchaser should not agree to its inclusion without knowing the significance of the prior instrument.

Sale Subject to Existing Mortgage

The recital of the purchase price, for reasons already mentioned, should avoid all ambiguity. The full purchase price should be expressed as well as the purchaser's credits against this sum for the amount of his down payment, amount of any existing mortgage and of any purchase money mortgage to be delivered, and the cash balance payable on the delivery of the deed.

If there is an existing mortgage, its amount should be a credit to the purchaser. If the full purchase price is \$35,000, and an existing mortgage was given for \$25,000, the seller is entitled, apparently, to only \$10,000 in cash. Suppose the seller claims the mortgage has been reduced to \$20,000 by payment and that he is, therefore, entitled to \$15,000 instead of \$10,000. Purchaser should have satisfactory proof of this reduction. One of the contract forms used in the New York City area for many years provides for such proof by requiring the seller to give purchaser a certificate of the mortgagee in recordable form, showing the

mortgage principal, interest rate and maturity. The writer has never known this instrument to be delivered, because mortgagees are unwilling to give it. Accordingly, it is unwise for a seller to leave this clause in the contract. Banks and other lending institutions will usually give a letter with these mortgage data, but may be kittenish about certifying their own records, as indicated by an occasional sentence in these letters: "This letter shall not constitute an estoppel", or "The foregoing shall not bind this bank." For these reasons some contracts provide that the mortgage data may be shown by a letter, bill or receipt from the mortgagee. If the mortgagee is a bank, this may be the best one can do.

Purchaser should see a copy of any existing mortgage and read it from beginning to end. This is not enough. He should also see the mortgage bond or note. Suppose the interest rate is 5 per cent in the mortgage and 5½ per cent in the bond or note. This may happen whenever a typist fills in comparable blanks with different figures. In case of a repugnancy, the bond or note prevails over the mortgage, even though of the two it is the mortgage which is on record. This is predicated on the theory that the obligation is the thing, and the mortgage merely collateral.³⁹

But the bond and mortgage may not tell the whole story. A mortgage given to secure \$25,000 may subsequently secure a larger debt, as where the mortgagee has made advances for real estate taxes or insurance premiums after the mortgagor's failure to pay these items.⁴⁰ An estoppel from the mortgagee is necessary.

Purchase Money Mortgage

If any part of the purchase price is payable in the form of a purchase money mortgage the contract should not only set forth the amount of the mortgage and its terms of payment but also the form of the mortgage to be used. The seller ordinarily sees to this in order to assure himself of a mortgage which is readily and effectively enforceable. If the contract should provide

The purchase money mortgage in-

struments shall be in form satisfactory to Seller and shall contain such covenants for the Seller's protection as Seller's attorneys shall specify,

ask seller's attorneys for his customary instruments. If these forms are satisfactory—which would be surprising—the contract should identify this form. The contract may refer to some form in general use in the community. At any rate it is important for buyer's attorney to be familiar with the form of any mortgage papers so designated. If any provisions are to be added or deleted the contract should so state. A clause most frequently added is a right to prepay, because a mortgagee need not accept payment in advance of maturity.

The importance of a right to prepay was highlighted by a case⁴¹ where the holder of a mortgage exacted a bonus of \$2,000 as a condition of accepting prepayment of a mortgage of less than \$15,000. The right to do this was upheld.

If there is a prepayment right, it should be clear whether (a) the right is to prepay in whole or in part, or in multiples of, say, \$1,000, (b) prior written notice of election to prepay must be given and (c) there is to be a prepayment charge.

Most mortgages today require periodic amortizations. Suppose an owner has \$1,000 and decides the best use of this money is to reduce his mortgage. Later, when a required amortization is due he is pinched for funds. May he take credit for the voluntary amortization he previously made? The little relevant authority indicates he may not.⁴² The parties may agree otherwise and, if so, the mortgage should be prepared accordingly.

36. *Roller v. Frankel*, 9 App. Div. 2d 24, 189 N.Y.S. 2d 444 (3d Dept. 1959); *Friedman*, §87, page 261, note 51.

37. *Dixie Pine Products Co. v. Switzer*, 111 So. 2d 518 (La. App. 1959); *Hathorn v. Hinds*, 69 Me. 326, 329-330 (1879); *Friedman*, §87, page 262, note 52.

38. *Pillmore v. Walsworth*, 166 App. Div. 557, 152 N. Y. Supp. 344, *affd.*, 232 N. Y. 591, 134 N.E. 584 (1922); and see generally *Friedman*, §87, pages 261-264.

39. *Adler v. Berkowitz*, 254 N. Y. 433, 173 N.E. 574, 31 Cos. L. Rev. 328 (1930); *Friedman*, §77, page 226; 36 Am. Jur. 748; 10 C.J.S. 485.

40. See *Friedman*, §78, page 234, §80.

41. *Feldman v. Kings Highway Sav. Bank*, 278 App. Div. 589, 102 N.Y.S. 2d 306, *affd.*, 303 N.Y. 675, 102 N.E. 2d 835 (1951). See also 130 A.L.R. 73 (1941); 75 A.L.R. 2d 1265 (1961).

42. 48 A.L.A. 273 (1927).

Encumbrances on Title

The contract will provide:

"Said premises are sold and are conveyed 'subject to:' after which is inserted a list of title exceptions. There is a good reason for this. A purchaser is entitled to a marketable title. This need not be stated in the contract. It is implied by law.⁴³ A few of the matters which make titles unmarketable are: mortgages and other encumbrances, restrictive covenants and leases. If the premises are affected by, say, an easement, title is unmarketable and the purchaser may reject title unless he consents to take subject to this easement.⁴⁴ If he does so consent he is no longer entitled to a marketable title as that term is defined in the books, but to a marketable title as so qualified. It might be well to call this a "contract title", but there is no such simple term in use. Instead, "marketable title" is used to indicate both marketable title in the abstract and, with some resulting confusion, the title to which buyer is entitled under a particular contract. At any rate, if the seller would have a contract which he may enforce he must make the sale subject to whatever would otherwise make title unmarketable.

Sometimes the contract reads: "Subject to an easement recorded in Book 40, page 10." In this case ask the seller's lawyer for a copy of the instrument in question. Perhaps he does not have it and does not know what it is about—he found a reference to it somewhere and knows it should be expected. The purchaser's lawyer would be reckless in taking this pig-in-a-poke. There is some tendency to avoid this situation, and provide in the contract:

Subject to covenants and restrictions of record provided same are not violated by the existing improvements and the use thereof.

This may work as a sort of makeshift in case of a house bought for residential purposes but not even then if a non-residential use is ever apt to become important—even such incidental use as that of a doctor, hairdresser, etc. This clause cannot be accepted if a business use is contemplated. It gives no assurance that the house may ever be replaced with a different kind of

building without violating a restriction of record. Furthermore, the clause may embrace more than one might suspect as in a case within the writer's experience where a restriction on record forbade a sale of the property to any person who would not be admitted to membership in a specified club.

Benefit Assessments

The possibility of an ordinary assessment against the property requires no mention in the contract. The assessment is an encumbrance,⁴⁵ the discharge of which is the seller's obligation. But the possibility of a benefit assessment, payable in installments over a period of years, perhaps ten or more, does merit special attention. It is not always certain when the installments become liens.⁴⁶ One contract form in use in New York disposes of the matter in the buyer's favor by providing that if the first installment is a lien, or has been paid, the entire assessment becomes the seller's responsibility. A seller's contract, on the other hand, provides that the seller shall be responsible for only such installments as shall have become due and payable on the date provided for the delivery of the deed.

A careful buyer may not only inspect the house before buying but also look to see if streets have been completed, sidewalks laid, sewers installed, etc. Perhaps he may find all these installed. But that is not the entire story—even if the tax search shows no unpaid assessment against the property for these improvements. The assessment may come a year or so later. This interval between improvement and assessment is not unusual. If there had been no assessment at the time of the conveyance, the seller is not responsible, absent an agreement on this point,⁴⁷ and neither is the purchaser's title insurance company.⁴⁸ If the assessment comes later, the purchaser may embarrass his lawyer by asking if the big purchase price for the property did not include sidewalks and sewers. This is something a buyer's lawyer must have in mind in all cases, particularly in a newly developed neighborhood.

The Deed—Warranties?

The contract may specify the form of deed to be delivered. Absent such specifications, some states entitle the buyer to a warranty deed while others do not.⁴⁹ In the New York metropolitan area many sellers' attorneys disapprove any warranties, even a covenant against grantor's acts. There, buyers have their titles examined and insured by a company in the insurance business and which is compensated therefor. If a title defect should turn up—i.e., if the title company has slipped up—the title company will be liable to its insured. But if the seller's deed includes a warranty, the title company will be entitled to recover over against the grantor—or his estate—under the doctrine of subrogation.⁵⁰ In other words, the grantor will re-insure an insurance company. There seems to be no excuse for this. In some areas the custom of giving warranty deeds is so ingrained that an effort to give less will encounter substantial resistance. Furthermore, in some states a grantee under a quitclaim deed is not an innocent purchaser for value, so that something more than a quitclaim is essential for the purchaser.⁵¹

Fixtures—Personal Property

A conveyance of real property includes its fixtures, though not specially mentioned. Personal property is not included, and if the buyer expects any personal property, this should be mentioned in the contract.⁵² There are variations in local law as to what is a fixture. In apparently most states gas ranges and refrigerators are treated as fixtures and, therefore, are included in a conveyance without express provi-

43. Friedman, §21; 4 Williston, CONTRACTS §923 (rev. ed. 1936); 92 C.J.S. 13.

44. See, generally, Friedman, Ch. 4.

45. *Barrett v. Carney*, 337 Mass. 466, 150 N.E. 2d 276 (1958); Friedman, §31.

46. See, generally, Friedman, §31; 59 A.L.R. 2d 1044 (1958).

47. See *Mandracchia v. McKee*, 167 N.Y.S. 2d 678, opin. on rearg. 8 Misc. 2d 965, 171 N.Y.S. 2d 602 (Sup. Ct. 1957).

48. *Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester*, 283 N. Y. 33, 27 N.E. 2d 225 (1940); 128 A.L.R. 373 (1940).

49. Friedman, §33, pages 251-252.

50. Friedman, §18 (Suppl.); 9 Appleman, INSURANCE LAW AND PRACTICE §4052, 5218 (1943); 29 Am. Jur. 1000; 46 C.J.S. 155.

51. Friedman, §83, pages 248-249; 1 Patton, TITLES §16 (2d ed. 1957); 92 C.J.S. 221.

52. *Silberg v. Kramer*, 68 N.E. 2d 835, 839-840 (Mun. Ct. 1946).

sion therefor.⁵³ But in New York they are held to be personal property.⁵⁴ A good check-list is useful to a buyer. Among the articles he should consider are ranges, refrigerators, bathroom and kitchen cabinets, mirrors, venetian blinds, shades, screens, awnings, storm doors and windows, window boxes, air conditioning units, garden tools, carpets, furniture, furnishings and various articles attached to or used in connection with the premises.

Defective Title— Seller's Liability

A typical clause is to the effect that if seller shall be unable to convey title in accordance with the contract, his sole liability will be to return any payments made on account of the purchase price and reimburse purchaser for his title examination and survey; and thereupon the contract will be terminated. In case of defective title, then, the seller is not to be liable for damages or for purchaser's loss of bargain. Neither may seller be compelled to convey such title as he has and allow purchaser a substantial abatement in price because of the defect. Even without this provision a seller who acts in good faith is not liable for damages because of a defective title.⁵⁵ Despite its literal wording this clause does not end a contract automatically; it merely gives purchaser an election. The purchaser may, nevertheless, waive the defect and require the seller to convey, but without reduction in price.⁵⁶ This is consistent with the general rule that a party for whose benefit a condition exists may waive the condition and enforce the contract.⁵⁷ Massachusetts is apparently alone in holding otherwise.⁵⁸ Perhaps it would be better draftsmanship to provide expressly that the purchaser may waive the defect and enforce the contract otherwise, but without abatement. In at least one case it has been held that a seller is not "unable" to convey, under this clause, when a little effort and expense will cure the title, and that it is seller's obligation to go to such trouble and expense.⁵⁹

Caveat Emptor

The rule of *caveat emptor* should be considered, because in the ordinary

sale of realty this doctrine not only applies, it flourishes. (See generally Seavy, "Caveat Emptor as of 1960," 38 Tex. L. Rev. 438, 445 (1960).) If a purchaser signs a contract and then learns that the cellar collects water,⁶⁰ the roof leaks or the place is infested with termites,⁶¹ it is the purchaser's hard luck. If the sewer connection is through adjoining property—and the adjoining owner cuts the connection⁶²—or if the heater proves defective,⁶³ the same is true. If the seller misrepresents, that is another story. But if the seller will only keep his mouth shut, almost anything goes.

Purchasers have occasionally sought to overcome the difficulties of *caveat emptor* by claiming the physical appearance of the property was a misrepresentation. In a Pennsylvania case a purchaser looked at a new house and noticed the ample driveway. He signed a contract to purchase without knowing the driveway had been so widened that for a distance of 50-60 feet it encroached 5½-6 feet on a neighboring lot. In an action to recover the down payment, judgment was given the defendant-seller. The court refused to hold that the physical condition of the property was a material misrepresentation.⁶⁴ Other cases are directly contra.⁶⁵ It is a situation which is almost certain to breed litigation.

When the purchase is of a house to be built or in course of construction, the rule of *caveat emptor* does not necessarily apply. There is some authority which regards this situation as, in part, a building contract and, accordingly, implies a warranty of fitness.⁶⁶ There is also authority to the effect that a contract to build and sell a house similar to a model house implies a

warranty of good condition.⁶⁷ An English court explained: one who buys a used house may not necessarily need it as a dwelling, or may consciously buy a building in need of repair. But when a house is bought new or in course of construction there is no mistaking the object. The essence of the transaction is that the house will be fit for occupation and a warranty of fitness for this is implied. *Miller v. Cannon Hill Estates Ltd.*, 1931 2 K. B. 113, 120-121, noted in Hall, "Caveat Emptor" and Buying a House," 26 Solicitor 305 (December, 1959).

Streets

Reference has already been made to the possibility of an assessment against the property, based on the installation of streets, sidewalks or other improvements. If these have not been installed, we have a preliminary question—how do we know they will be installed? It is possible that the municipality has required the developer to give a bond to secure their installation and to secure their payment as well. Sometimes, government insured mortgage loans require a builder to do this and, in addition, require approval by government inspectors before mortgage money will be available. This may exert more pressure on a builder than a purchaser can.

Even so there may be some surprises for the purchaser. If the grade is set after a house has been finished, and at a lower level than that contemplated by the builder, the house may look as if it had been built on stilts.⁶⁸ In one case a short driveway was so steep that getting a car in and out of the garage became an engineering feat.

53. *Kratovil, Fixtures and the Real Estate Mortgage*, 97 U. Pa. L. Rev. 180, 184 (1948).

54. *Madjes v. Beverly Development Co.*, 251 N. Y. 12, 166 N.E. 787 (1929).

55. *Friedman*, §3, page 11.
56. *Kubicek v. Way*, 102 So. 2d 173 (Fla. 1958); *Otto v. Young*, 227 Mo. 193, 127 S.W. 9 (1907); 10 L.R.A. (N.S.) 117, 121.

57. 3 Corbin, *Contracts* §761 (1951).

58. *Barrett v. Carney*, 337 Mass. 466, 150 N.E. 2d 276 (1958).

59. *Mok Properties Corp. v. Hall*, 6 App. Div. 2d 536, 179 N.Y.S. 2d 814 (1st Dept. 1958).

60. *Berger v. Burckoff*, 200 Md. 561, 92 A. 2d 376 (1952).

61. *Fegans v. Sherrill*, 218 Md. 477, 147 A. 2d 223 (1958) (and cases collected).

62. See *Potter v. Hill*, 43 N. J. Super. 361, 128 A. 2d 705 (1957); *Green v. Collins*, 86 N. Y. 246 (1881); *Perine v. Mardine Realty Co.*, 5 App. Div. 2d 685, 168 N.Y.S. 2d 646, *aff'd*, 6 N. Y. 2d 920, 161 N.E. 2d 210 (1959).

63. See *Evens v. Young*, 196 Tenn. 118, 264

S.W. 2d 577 (1954).

64. *Woldow v. Dever*, 374 Pa. 370, 97 A. 2d 777 (1953).

65. *Dugan v. Bosco*, 108 A. 2d 586 (Del. 1954); *O'Shea v. Morris*, 112 Neb. 162, 198 N.W. 866 (1924). Cf. *C. H. Boehmer Sales Agency v. Russo*, 99 So. 2d 475 (La. App.), noted in 19 La. L. Rev. 196 (1958).

66. *Vanderschrier v. Aaron*, 103 Oh. App. 340, 140 N.E. 2d 819 (1957); *Hoye v. Century Builders, Inc.*, 132 Wash. 776, 329 P. 2d 478 (and cases collected), noted in 34 Wash. L. Rev. 171 (1959); *Selker, Right of Purchaser in Sale of Defective House*, 4 West. Reserve L. Rev. 257 (1953). The same rule applies in *England Miller v. Cannon Hill Estates Ltd.*, [1931] 2 K. B. 113, 121, noted in Hall, "Caveat Emptor" and Buying a House, 26 Solicitor 305 (December, 1959).

67. *Wheaton Park, Inc. v. Lombardi*, 149 A. 2d 422 (Nun. App. D.C. 1959).

68. Cf. *Sperling v. Title Guarantee & Trust Co.*, 227 App. Div. 3, 236 N. Y. Supp. 533, *aff'd*, 252 N. Y. 613, 170 N.E. 163 (1930).

Risk of Loss

The premises may be damaged or destroyed between the date of the contract and the time provided for delivery of the deed. The contract sometimes provides how this shall affect the rights of seller and buyer. Absent an agreement on this several rules are applicable.

1. *Majority Rule.* Under the majority rule the risk of loss passes to the purchaser as soon as the contract is signed. It is immaterial whether buyer or seller is in possession.⁶⁹ Purchaser is liable for the full purchase price without abatement for the injury. Most states following this rule give the purchaser the benefit of seller's insurance.⁷⁰ This is not a full *quid pro quo* for the risk of loss, because it not only burdens the purchaser with settling the seller's insurance but also exposes him to the risk of inadequacy of its amount and possible defenses to payment which the insurer may have against the seller. A minority within the majority states deny the purchaser the benefit of seller's insurance.⁷¹ In these states the purchaser should be covered by his own insurance as soon as the contract is signed.

2. *Minority Rule.* Under the minority rule the risk of loss is with the seller.⁷² The consequences of this are not the same in all states. In perhaps most of these states the purchaser is entitled to specific performance by seller, with an abatement in the purchase price commensurate with the damage. In Massachusetts substantial destruction releases both parties from the contract except for purchaser's right to recover any advance on the purchase price.⁷³ New Hampshire is virtually the same. There, the effect of the risk being on the seller apparently gives him the option to repair the damage and enforce the contract, or to treat the contract at an end.⁷⁴ In Connecticut the purchaser has recovered his down payment, but whether he could compel specific performance with an abatement seems not to have been decided.⁷⁵

3. *Uniform Purchaser and Vendor Risk Act.* The Uniform Act is now in effect in eight states.⁷⁶ The act makes possession pivotal. If seller is in possession, a material injury bars him

from enforcement of the contract and purchaser may recover any payment on the purchase price. Presumably this does not bar purchaser from enforcing specific performance with an abatement. As the act was enacted in New York, after immaterial injury neither party is barred from enforcing the contract but the purchaser is entitled to an abatement in price.⁷⁷ If purchaser is in possession the risk is on him. What is "material" or "immaterial" may vary with the circumstances. The act leaves other questions unresolved.⁷⁸ It provides that it is applicable only where the parties fail to stipulate otherwise.

Many people are dissatisfied with both the case law and Uniform Act. There is nothing to prevent them from agreeing which party shall bear the risk.⁷⁹ A short clause, which has been in frequent use for this purpose, reads:

The risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the Seller.

By restricting itself to fire this stipulation fails to cover any other form of injury,⁸⁰ whereas the risk of loss, when imposed on either party, has been held to include injury from windstorm, vandalism, boiler destruction, hurricane, erosion, subsidence and collapse of a retaining wall.⁸¹ Furthermore, as mentioned in paragraph 2 above, this might, on the one hand, merely entitle purchaser to return of his down payment or, on the other, expose seller to the possibility of a substantial abatement. Accordingly, current stipulations are apt to be more precise. They may take many different

forms. The following are résumés of a few which might be used in connection with the sale of a house:

A. In case of injury, seller has the option to restore. If seller fails to restore purchaser may: (1) terminate the contract; or (2) accept a deed, without abatement, but with seller's rights to insurance.

B. (1) If the injury is less than 10 per cent of the purchase price purchaser shall complete the contract; and (2) if the injury is greater than 10 per cent purchaser has the option of completing or terminating the contract. If in either case the contract is completed purchaser is entitled to an abatement commensurate with the damage.

C. (1) If the injury does not exceed a stated amount purchaser shall accept the premises as damaged, with seller's right to insurance; and (2) if the injury exceeds the sum mentioned purchaser has the option of either completing the contract, and receiving seller's right to insurance, or terminating the contract.

All these stipulations provide that if the contract is terminated by reason of the injury seller will repay purchaser the amount of any advance on the purchase price. None of these stipulations, for reasons already mentioned, are apt to be entirely satisfactory to both parties.

Risk of loss, as mentioned above, has involved injury which is sudden and more or less violent and, fortunately, of comparatively infrequent occurrence. Other injury is possible. All property necessarily deteriorates in the interval between the date of the contract and the closing. This is usually the gradual and virtually imperceptible effect of ordinary use and of

69. Friedman, §52, page 135; 4 Williston, CONTRACTS (rev. ed. 1936) §929 et seq.; 27 A.L.R. 2d 444 (1935); 55 Am. Jur. 817-822, 993.

70. Friedman, §52, page 135; 3 Corbin, CONTRACTS (1951) §670; 64 A.L.R. 2d 1402, 1406 (1959).

71. *Brownell v. Board of Education*, 239 N. Y. 369, 146 N.E. 630, 37 A.L.R. 1319 (1925), noted in 25 Col. L. Rev. 447; 28 Col. L. Rev. 202, 205 (1928); 64 A.L.R. 2d 1402, 1404 (1959). New York's adoption of the Uniform Vendor and Purchaser Risk Act did not change its rule respecting the application of insurance moneys. Compare *Raplee v. Piper*, 2 App. Div. 2d 732, 152 N.Y.S. 2d 799 *aff'd*, 3 N. Y. 2d 179, 143 N.E. 2d 919, 64 A.L.R. 2d 1397 (1957), criticized in 33 N. Y. U. L. Rev. 95 (1957), with *Burack v. Tollig*, 6 Misc. 2d 450, 160 N.Y.S. 2d 1008 (Sup. Ct. 1957).

72. Friedman, §52, page 136; Simpson, *Legislative Changes in the Law of Equitable Conversion by Contract*, 44 Yale L. J. 754, 756 (1935).

73. *Hawkes v. Kehoe*, 193 Mass. 419, 79 N.E. 766, 10 L.R.A. (N.S.) 125 (1907).

74. *Lampesis v. The Travelers Insurance Company*, 101 N. H. 323, 143 A. 2d 104 (1958).

75. *Anderson v. Yaworski*, 120 Conn. 390, 181

Atl. 205, 101 A.L.R. 1232 (1935).

76. California, Hawaii, Michigan, New York, North Carolina, Oregon, South Dakota, Wisconsin.

77. N. Y. Real Prop. L. §240-a.

78. See Friedman, §50, pages 133-134; Lacy, *The Uniform Vendor and Purchaser Risk Act and the Need for a Law-Revision Commission in Oregon*, 36 Ore. L. Rev. 106 (1957).

79. *Coolidge & Sickler, Inc. v. Regn*, 7 N. J. 93, 80 A. 2d 554, 27 A.L.R. 2d 437 (1951); *Brownell v. Board of Education*, 239 N. Y. 369, 374, 146 N.E. 630, 632, 37 A.L.R. 1319 (1925).

80. *Pellegrino v. Giuliani*, 118 Misc. 331, 193 N. Y. Supp. 258 (Sup. Ct. 1922); 92 C.J.S. 177, note 95.

81. *Farrell v. Federal Land Bank of Wichita*, 175 Kan. 786, 267 P. 2d 497 (1954); *Libman v. Levenson*, 236 Mass. 221, 128 N.E. 13, 22 A.L.R. 560 (1920); *Coolidge & Sickler, Inc. v. Regn*, 7 N. J. 93, 80 A. 2d 554, 27 A.L.R. 2d 437 (1951); *Gallichio v. Jarzla*, 18 N. J. Super. 206, 86 A. 2d 820 (1952); *New York Medical College v. 15-21 East 11th St. Corp.*, 90 N.Y.S. 2d 591 (1949); *Pellegrino v. Giuliani*, 118 Misc. 331, 193 N. Y. Supp. 258 (1922); *Tepley v. Sumerlin*, 46 Wash. 504, 282 P. 2d 827 (1955).

exposure to the weather. This risk is on the buyer.⁸² In most cases the interval is brief and the deterioration of no practical importance. In an early New York case the interval was four years, during which time the premises had allegedly become seriously dilapidated because of the seller's failure to repair. It was there held that the seller was under no duty to repair,⁸³ but the weight of the little relevant authority is said to be contra.⁸⁴ New York has held that damage due to seller's mismanagement and neglect is to be borne by seller.⁸⁵

Contract Conditioned on Purchaser's Obtaining Mortgage

Contracts of sale are frequently made contingent upon the purchaser's obtaining a mortgage loan from some lending institution. Sellers agree to this only because frequently there is no other way to effect a sale. They often complain that this gives the purchaser an option on the property. It is no option if the purchaser is under an affirmative obligation to take specific steps in an effort to obtain a mortgage of specified terms.

Frequently, the clauses used for this purpose are poorly phrased and leave in doubt the rights and obligations of the parties. There is a little authority to the effect that a condition of this kind leaves performance optional with the buyer and that this deprives the contract of mutuality and enforceability.⁸⁶ And it has been held that a contract "subject to" the purchaser's obtaining a mortgage imposes no obligation on the purchaser to act.⁸⁷ A contract giving a purchaser the right to recover his down payment if he "shall be unable to obtain approval" of a loan has been held to imply an affirmative obligation to seek the loan.⁸⁸ A contract "subject to necessary financing" has been held to permit the buyer alone to determine what is "necessary", subject only to good faith on his part.⁸⁹ But in another case a buyer was held to have made the determination when he applied, successfully, for a £3,000 loan. He had assumed that this, plus the sale of some securities, would be sufficient. But this proved wrong because of a drop in the

value of the securities. His inability to complete the sale was held to be his fault.⁹⁰ If a buyer is under an affirmative duty to seek a loan, his failure to carry out his obligation may result in the forfeiture of his down payment⁹¹ or a liability for damages.⁹² He cannot be expected to apply to every available lending institution. But being turned down by two banks was held insufficient where a loan was found to be available from a mortgage company.⁹³ This situation is obviously not satisfactory to the purchaser. It is no more satisfactory to an owner-seller who must withdraw his property from the market for perhaps a month or two while this is going on, not knowing if the sale will go through and paying taxes and other carrying charges in the interim. Perhaps the buyer should pay some of these charges but this is not often done.

There is little point in either party's signing this kind of contract unless there is reasonable assurance that the purchaser can qualify for the necessary loan. The contract should specify the terms of the loan the purchaser is expected to accept, the precise steps the purchaser is expected to take in seeking this loan and the time within which this is to be done. The purchaser should agree to make these efforts. Finally, the contract should express the purchaser's right to recover the down payment in case of failure to obtain the loan.

Purchase of House in Course of Construction

One who buys a house in the course of construction or to be built in a development is apt to be offered a

"standard" form of contract. Probably typical is a form marked "Contract for Sale of New Houses, Approved by N. J. Home Builders' Association and Accepted by the V.A. for N. J." Its provisions include, in substance, the following:

The house will be completed substantially similar to a sample house, the sample house being identified. But, subject to the approval of the F.H.A. or V.A. the builder may make substitution of material whenever the builder shall find it necessary or expedient and may make changes in construction that seller may find necessary.

The contract is conditioned on the ability of the seller to complete construction at current prices of material and labor. Otherwise, seller may return the down payment and call the deal off.

If completion of construction is delayed because of inclement weather, strikes, etc., the seller's time to perform is extended for a period commensurate with such delay. This makes it difficult for a buyer to plan on moving or to enroll his children in school. Any such provision should provide for an ultimate cut-off date, after which the buyer may cancel and entitle himself to reimbursement of any payments made.

If seller's title is unmarketable or if seller cannot complete construction, seller shall return buyer's down payment plus buyer's expense for title insurance, and seller is released.

If buyer defaults, the down payment may be retained by seller, either on account of the purchase price or as compensation for seller's expenses, whereupon the contract becomes void and all copies are to be returned to the seller for cancellation.

In another contract the writer found a clause which contemplates the possible

82. 55 Am. Jur. 812; and see *Heerd v. Brand*, 272 App. Div. 143, 145, 70 N.Y.S. 2d 1, 2 (4th Dept. 1947).

83. *Hellreigel v. Manning*, 97 N. Y. 56 (1884). Accord: *Neponsit Realty Co. v. Judge*, 106 Misc. 445, 176 N. Y. Supp. 133 (Sup. Ct. 1919). Insofar as these cases involve substantial damage to the premises, they must be deemed overruled by New York's enactment of the Uniform Vendor and Purchaser Risk Act (N. Y. Real Prop. L. §240-a).

84. Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 Minn. L. Rev. 108 (1953); Note, *The Vendor's Liability for Permissive Waste*, 48 Harv. L. Rev. 821 (1935).

85. *Bostwick v. Beach*, 105 N. Y. 661, 12 N.E. 32 (1887); *Goldberg v. Alois*, 3 Misc. 2d 154, 154 N.Y.S. 2d 273 (County Ct. 1956).

86. *Scarborough v. Novak*, 92 Ga. App. 488, 88 S.E. 2d 890 (1955); *Zaring v. Lavatta*, 36 Idaho 459, 211 Pac. 557 (1922). Compare *Caras v. Parker*, 149 Cal. App. 2d 621, 309 P. 2d 104 (1957). Contra: *DiBenedetto v. DiRocco*, 372 Pa. 302, 93 A. 2d 474 (1953); and see generally

Friedman, §3.

87. *Connor v. Rockwood*, 320 Mass. 473, 69 N.E. 2d 454 (1946). Accord: *Weisner v. 791 Park Ave. Corp.*, 6 N. Y. 2d 426, 160 N. E. 2d 720 (1959).

88. *Stabile v. McCarthy*, 336 Mass. 399, 145 N.E. 2d 821 (1957). Accord: *Lach v. Cahill*, 138 Conn. 418, 85 A. 2d 481 (1951).

89. *Reese v. Walker*, 151 N.E. 2d 605 (Mun. Ct. Cin. 1958). See, generally, Aiken, "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, 43 Manq. L. Rev. 265 (1960).

90. *Barber v. Crickett* [1958] N.Z.L.R. 1057, noted in 34 N.Z.L.J., No. 16 (Sept. 2, 1958) page 241.

91. *Bayon v. Pettingill*, 77 So. 2d 202 (La. App. 1955); *Foelsch v. Eaton*, 12 Misc. 2d 844, 172 N.Y.S. 2d 243, mod. and aff'd. 7 App. Div. 2d 730, 180 N.Y.S. 2d 757 (2d Dept. 1958).

92. *Widebeck v. Sullivan*, 327 Mass. 429, 99 N.E. 2d 165 (1951).

93. *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P. 2d 905 (1958). Cf. *Stabile v. McCarthy*, 336 Mass. 399, 145 N.E. 2d 821 (1957).

enactment of an ordinance forbidding "look alike" houses, and which gave the builder *carte blanche* to change the façade of the building. Another paragraph in this contract permits the builder to assign the contract to a third person and provides that the builder is released from his obligations under the contract on their being assumed by the assignee. This paragraph permits the builder, in effect, to erase his signature from the contract, and if the assignment is made to a dummy, there will be no responsible party to whom the purchaser may look.

The purchaser who finds these provisions objectionable is apt to learn that a "standard" contract is a contract of adhesion and changes therein difficult to obtain. This is not invariably true, however. The writer's firm had occasion recently to pass on another builder's form of contract. This contract did not refer to a model house but, instead, had attached two pages of building specifications. This is a more professional way of handling the matter—or would be if some of us were qualified to pass on building specifications.

A few comments on this contract might be helpful:

One paragraph forbids the buyer from offering to sell the premises to a third person for three years without offering them back to the seller at the original purchase price. This clause was stricken from the contract. It could be used to bar minority groups from an area. Its existence would tend to discourage the purchaser from making any substantial improvements during the three-year period.

Here, too, seller is authorized to make changes in materials or construction; and, also, in case of delays, scarcity of materials, etc., to call the deal off. This was also stricken from

this contract.

In order to make this contract more attractive, the seller had attached a mimeographed rider with the following provisions:

Seller guarantees the plumbing and heating system against defects in workmanship and materials for one year and that the heating system would have a capacity to heat the house at 70° in zero weather.

Also, seller guarantees the basement walls and roof shall be free from leakage, due to faulty construction, for one year. In this contract "due to faulty construction" was deleted, so as to make the guarantee absolute. It is possible that even if work and materials are good, the cellar will leak if the soil—clay, for instance,—prevents the water from running off.

Next, seller represents the street will be paved, and sewers, curbs and public utilities installed—all without charge or assessment to the purchaser.

To the purchaser it seemed that this clause could be improved, and seller made no objection to the addition of the following:

Seller guarantees that the premises shall not be subject to any assessment by the City or any other governmental subdivision by reason of any improvements, such as streets, sewers, curbs or drains which shall have been installed at the premises or the streets abutting the same at the time of the delivery of the deed hereunder.

In addition, seller agreed to the inclusion of this final paragraph:

Seller represents that it has dedicated the streets abutting the premises to the City and that the City has accepted such dedication, subject to the completion of streets, sewers, drains and curbs, and, further, the seller has given and the City has accepted a bond

to secure the completion of said work.

If a new building requires a certificate of occupancy or an approval by fire underwriters of electrical installation, or if it is customary to obtain similar certificates with respect to plumbing and the like, the contract should provide that the seller will deliver these at the closing.

In case of a new building, guarantees by the subcontractors are customary. There is usually a roof guaranty and a guaranty of the plumbing and heating equipment, electrical installation and perhaps others. The contract should provide that the seller will transfer and deliver these to the purchaser at the closing.

If, as is likely, the builder is financed by a building loan mortgage, its lien, as well as potential liens for unpaid labor and material, will be paramount to any down payment of the purchaser. In case of trouble the down payment will probably be wiped out. This may be avoided only if the down payment is made in escrow. But inasmuch as down payments are frequently used to pay builders' current bills few builders are apt to agree to an escrow.

The purchaser of a moderately priced house assumes risks with respect to construction which his lawyer can cover only imperfectly. The defects in a house may be present at its birth, but, like a young man's moustache, do not appear until later. Guarantees and the like are but paper and there is a limit to the strength of paper where its only legal use is to bring a succession of minor lawsuits. When all is said and done the buyer's best protection is the competence and integrity of the builder.

A Case of Whisky

The case that Mr. Atkins writes about contains a large quantity of bourbon and other spirituous liquors destroyed by the citizens of a Tennessee town during the Civil War to prevent their seizure—and the disorders that might ensue—by General Grant's force fresh from its capture of Fort Donelson. After the war, some of the owners filed suit for damages.

by Hobart F. Atkins • *of the Tennessee Bar (Knoxville)*

ON THE SEVENTEENTH of February, 1864, the citizens of the City of Clarksville, Tennessee, held a public meeting in the Mayor's office. The meeting had been called to concert measures for the protection of the people of Clarksville in anticipation of an invasion by the federal army.

Fort Donelson, the military key to Clarksville, had surrendered on the day preceding. The City of Clarksville was about thirty miles from the fort, and the occupation of the city seemed imminent. Clarksville merchants had a large quantity of whisky and other spirituous liquors in the city, which it was feared would imperil the lives and property of the inhabitants if they should fall into the hands of the federal soldiery, then flushed with victory and inflamed with the passions of civil war. After much discussion, a resolution was adopted by which the citizens resolved to destroy the spirituous liquors as a measure of safety. The resolution recommended to the common council of the city and to the authorities of Montgomery County that they levy a special tax to raise a fund for the reimbursement of those whose property was to be destroyed. A number of persons were appointed to advise the owners of the resolution and to invoke their acquiescence. One of the merchants, A. B. Harrison, had a large quantity of whisky, brandy and wine stored in the city. When the citizens' representative called on him he

gave his keys to his clerk with instructions to hand over the liquors to be destroyed.

After the close of the war, in March, 1866, Harrison filed a lawsuit in the Circuit Court of Montgomery County seeking to recover the value of the liquors so destroyed. When the cause was put in issue, the defendants entered a special plea of "public necessity". A jury was impaneled to try the facts and the trial in the Circuit Court resulted in a verdict and judgment for the defendants. Harrison appealed to the Supreme Court of the State of Tennessee.

The record does not disclose whether the city or county authorities took any action to levy a special tax to pay for the liquor that was destroyed, or whether the interposition of either was ever invoked as promised by the resolution.

It appears from the record that the meeting at the Mayor's office was very well attended by the citizens. B. H. Wisdom, the person designated to destroy Harrison's liquor, stated that the office was crowded and that a large number of citizens were standing in front of it unable to gain admittance. Harrison was represented by John F. House who asked the witness why the meeting had been called. He explained its purpose and went on to say that on the same day he met Harrison and told him of the resolution to destroy the liquor. He testified that he had told

Harrison that the resolution called upon the Mayor, the aldermen and the county court to repay the owners of the liquor, and that he had taken accurate account of all the liquors destroyed.

Harrison's attorney asked Wisdom what took place at the other houses when the liquors of other citizens were destroyed, but the court ruled out this testimony. Wisdom apparently did not tell Harrison that he had been directed to use force in the destruction of the liquor, but he did say that he and the other defendants had been appointed to wait upon the owners and ask for their co-operation, assuring them that they would be paid for the loss. There is no question that there was at the time great excitement in the community and grave apprehension that the federal troops on their expected arrival from the fort would become intoxicated and commit depredations upon the inhabitants and their property.

The record shows that the plan agreed upon was that the corporate authorities were to be requested to destroy the liquors and that the citizens present at the meeting had agreed to the imposition of a special tax to refund the value of the destroyed property to the owners. There was much testimony about the method to be used in the destruction of the liquor. Some of the citizens argued that it should be destroyed whether the owners were willing or not, and there was some

A Case of Whisky

testimony that threats had been used. One of the owners testified that he had tried to remove his liquor from the town, but had been prevented from so doing.

The Judge Refuses To Disqualify Himself

During the progress of the trial, the plaintiff and his attorney learned that the presiding judge himself had attended the meeting of the citizens, and they argued that the judge should recuse himself. The judge admitted that he was present at the meeting but said that he had taken no part in it, and he refused to withdraw from the case. The plaintiff asked the court for special instructions to the jury to the effect that to authorize the destruction of property on the ground of public necessity, the danger must be so imminent and immediate, and the public safety so directly imperiled, that it is an absolute and unconditional necessity to destroy the property, and that this fact must be proved by the defendants, and must not have its origin merely in vague fears and unsustained apprehension. Instead, the court instructed the jury as follows:

If it appears the destruction of the whisky was done under the belief that it was necessary to the safety of the public, that is a question resting with you from the proof. Whether that the danger was imminent and impending, or that the citizens had reasonable grounds to believe that the destruction of the property was necessary for the public safety, to ascertain that you will look to the proof. In arriving at your conclusion on this point you will look to the state and condition of the country, the fall of Fort Donelson, the advance of the hostile forces, the nature of the property destroyed, its effects upon men, and the consequences that might result from permitting it to fall into the hands of hostile forces. All these facts you may look to, and if you are satisfied that the danger was imminent and impending, and the destruction of the property a public necessity for the safety of the public, then the defendants were justified in its destruction. But you must be satisfied from the proof that the danger was pending and imminent to authorize the destruction. It must not be imaginary, but real danger to the public, as stated.

This is enough of the record to present the more important questions relied upon by the plaintiff as grounds for the reversal of the judgment before the Supreme Court. The defendants contended it was not unlawful to destroy plaintiff's property because of the exigent public necessity. This, of course, could only be ascertained and understood by the acts and declarations of the defendants at the time of the combination to do the act. The connection of the defendants in pursuance of the original plan is, in the contemplation of law, the act and declaration of all, and is therefore evidence against each of them. Everyone who enters into a common purpose or design is generally deemed in law to be a party to every act that has been done and to every act that afterwards may be done by any of the others in furtherance of the common design. Such acts must be consistent with the principal act and so connected with it as to be regarded as the result and consequence of the co-existing motives. The Supreme Court held that it was error for the trial judge to exclude testimony as to what was said and done by the agents before and at the time of the destruction of the plaintiff's property. This testimony was ruled by the Supreme Court to be admissible to show that the plaintiff, Harrison, did not freely and voluntarily consent to the destruction of his property.

A very interesting and far-reaching observation was then made with reference to the plaintiff's objection to the overruling of his motion as to the incompetency of the trial judge and it was further interesting to note the acquaintance the Supreme Court had with the English courts and their holdings.

The Opinion of the Supreme Court

The opinion in this case was prepared by Judge Smith. The Supreme Court of Tennessee at that time consisted of Chief Justice A. O. P. Nicholson, Associate Justices, J. P. Turney, Robert McFarland, James W. Deadrick, Thomas J. Freeman and J. L. T. Sneed. All of these judges without exception had been prominently identified with the Civil War.

The case was decided on January 6, 1872, and their opinion states in part:

We are not prepared to say that the Circuit Judge who presided at the trial of this cause had such an interest in the result as disqualified him from sitting in judgment upon it. The Constitution of this State provides that no judge of the Supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or when either of the parties shall be connected with him by affinity or consanguinity, within such degrees as may be prescribed by law, or in which he may have presided in any inferior court, except by consent of all the parties: Art. v. sec. 11. This provision is certainly broad enough to fortify the integrity of the courts against suspicion; for the mere blemish of suspicion is, to the judicial ermine, a blot of defilement. It was an observation of Lord Coke that even an act of Parliament made against natural equity—as to make a man a judge in his own case—is void in itself. And it is a familiar remark of Sir William Blackstone that the administration of justice should not only be chaste but unsuspected. The maxim applies in all cases where judicial functions are to be exercised and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge or to his sense of decency to decide whether he shall act or not; all his powers are subject to this absolute limitation, and when his own rights are in question he has no authority to determine the cause. In an English case when the Lord Chancellor, who was a shareholder in a company in whose favor the Vice Chancellor had rendered a decree, affirmed the decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: "It is of the last importance that the maxim that no man is to be a judge in his own case, shall be held sacred, and it is not to be confined to a cause in which he is a party, but applies to one in which he has an interest. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."

Such is an example of the prestige preserved by the judiciary of England upon this subject, where the rule is a mere maxim of national equity; and it should be even the more sacredly guarded in this country, where it is a principle of the organic law itself. We, therefore, hold that no judge should preside in a cause, or render

any judgment, or make any order, where he can by possibility be suspected of being warped by the influence of fear, favor, partiality, or affection. When once a court has lost the charm of integrity and justice, with which it should ever be invested, it forfeits its influence for good, and degrades the majesty of the law.

The idea that the judicial office is supposed to be invested with ermine, though fabulous and mythical, is yet most eloquent in significance. We are told that the little creature called the ermine is so acutely sensitive as to its own cleanliness, that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur. When the hunters are pursuing it they spread with mire the passes leading to its haunts, to which they then drive it, knowing that it will submit to be captured rather than defile itself. And a like sensibility should belong to him who comes to exercise the august functions of a judge. It is his exalted province to pronounce upon the rights of life, liberty, and property, to make the law respected and amiable in the sight of the people, to dignify that department of the government upon which, more than all others depend the peace, the happiness, and the security of the people. But when once this great office becomes corrupted, when its judgments come to reflect the passions or the interest of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the common weal, and the law itself is debauched into a prostrate and nerveless mockery.

These observations were not applied in this case. It was shown that the trial judge had attended the meeting from mere curiosity, but that he was not a party to anything that was done there.

The court held that the most important question involved in the case was the question of whether or not there existed an absolute public necessity for the destruction of the plaintiff's property. As to this, the court held:

That the right of defense and self-preservation is a right inherent in com-

munities as well as individuals. Whether an imminent and absolute necessity exists to destroy private property for the common good, is a question to be determined by a jury, upon the facts of each particular case. An individual may take life to preserve his own, if he be in danger of death or great bodily harm, or think himself so upon reasonable grounds. But the grounds of his apprehension must be founded upon such facts as will acquit him of acting upon a mere fancied peril or with reckless incaution. The law is jealous in the protection it throws around human life and property, and the right to take either as a measure of self-preservation is to be exercised in a moment of extraordinary exigency when the private or public necessity absolutely demands it. The right to destroy property in cases of extreme emergency, as to prevent the spread of a conflagration, or as in the case now under consideration, is not the exercise of the right of eminent domain, nor the taking of property for public use, but a right existing at common law, founded on necessity, and it may be exercised by individuals in any proper case, free from all liability for the value of the property destroyed. This is but an exercise of police power. The destruction is authorized by the law of overruling necessity; it is the exercise of a natural right belonging to every individual, not conferred by law, but tacitly excepted from all human codes. The nature and character of that necessity is difficult to define except in general terms, and each case must depend upon its own facts. Such facts must be shown as to leave no doubt of an impending and imminent peril, or that a reasonable ground existed for the apprehension of such a peril to justify the act. The advance of the hostile army is cited as among the exigencies when such a necessity might exist to justify the destruction of private property. But what kind of private property may be thus destroyed would depend much upon the character of the warfare waged at the time, and upon the circumstances existing in the community. Thus, the destruction of a bridge or a boat, to check the advance of an army, or the explosion of a magazine of powder, or the destruc-



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tion of munitions of war or military supplies, or any articles contraband of war, would be but the exercise of a recognized belligerent right, and the rapid advance of a hostile army known to be undisciplined and licentious, and whose occupation of captured places in the line of march was known to be accompanied by acts of besotted vandalism, would upon the ground of public necessity justify the destruction of such property as is calculated to increase the public peril. But all these facts must enter into the consideration of the question whether the public peril did exist or whether there were reasonable and substantial grounds to believe so. Necessity makes that lawful which would be otherwise unlawful.

The Supreme Court held that it was unable to find that the trial judge had made any material departure from these principles, but because of errors in his rulings upon questions of evidence, the judgment was reversed and a new trial awarded.

Indianapolis Is Host to 700 Lawyers at Mid-Central Regional Meeting

TAKE 700 CONGENIAL people from six states, mix them together in a hospitable city, add liberal amounts of stimulating discussion, stir in plenty of food for thought, season with half a hundred college belles, hours of top-flight automobile racing, and then spread it all out in brilliant spring sunshine and balmy weather.

That was the Mid-Central Regional Meeting of the American Bar Association, held in Indianapolis from May 10 to 13 for lawyers from Illinois, Indiana, Kentucky, Michigan, Ohio and Wisconsin.

It was not the largest Regional Meeting in Association history, but, as one member remarked, mere size is no measure of the success of a meeting. The comparative smallness of the attendance made for an informal, relaxed atmosphere, and the panels and other sessions were perhaps more worthwhile because the size made more audience participation possible.

Although the Regional Meeting itself did not begin until Thursday morning, May 11, lawyers and judges began to gather in the Hoosier capital as early as Tuesday for the joint meeting of the United States Judicial Conference for the Seventh Circuit and the Seventh Circuit Bar Association. Associate Justice Tom C. Clark, Circuit Justice for the Seventh Circuit, was the featured speaker at the opening meeting of the conference, along with Albert B. Maris, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit.

At a luncheon meeting, James R.

Browning, Clerk of the United States Supreme Court, spoke on "Records of the Supreme Court, Human and Historic", and the afternoon was devoted to a discussion of the Federal Rules. The principal speaker at the Banquet of the conference that evening was Dean John Ritchie III, of Northwestern University Law School.

The opening session of the Regional Meeting proper convened Thursday morning. The main speaker at this session was Eugene J. Keogh, of New York City, the principal congressional sponsor of the bill to provide for tax credit for retirement benefits for the self-employed, one of the key proposals in the Association's legislative program. Congressman Keogh explained the latest version of the proposal; he said that chances of its passage at this session of Congress were "excellent".

The Assembly Luncheon was held that noon in the Riley Room of the Claypool Hotel, reviving for older members the memory of the 1941 Annual Meeting, which was the last time an Association meeting was held in Indianapolis. The speaker at the luncheon was John Stone, of Hollywood, the Association's Liaison Representative to the Television and Motion Picture Industries. Mr. Stone gave an amusing and informative talk on "The Changing Image of the Lawyer in Entertainment".

On Thursday afternoon, there were a number of panels and seminars offered by various groups, including the Sections of Insurance Law, Corporation Law, Taxation, Family Law, Judicial Administration; the National Association of Women Lawyers; the



Mr. Justice Clark



Representative Eugene J. Keogh

Committee on Savings and Loan Associations and the Attorney's Committee of the U. S. Savings and Loan League; the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. The variety of the organizations that arranged programs indicates the wide scope of the material that was available to the lawyers attending. The schedule for the afternoon included a demonstration of a jury argument (performed before a jury drawn from the audience which deliberated and gave its verdict) and a symposium on the unauthorized practice of the law.

Perhaps the program that drew the biggest crowd at the meeting was the combined seminar sponsored on Friday by the Sections of Antitrust Law, Corporation Law, Labor Law, Patent Law, Real Property Law and Taxation. Entitled "What Every Lawyer Should Know—Or the Day Before Vacation", the presentation was given in the form of a three-act play which offered valuable information about the latest legal trends in an amusing, attention-holding way. The "play" had a cast of nineteen and was written by eleven lawyers.

Other programs on Friday included a legal assistance conference, of particular interest to lawyers with military clients, and a conference on traffic courts and traffic safety.

Nothing ever runs entirely according to plan, and unfortunately Admiral William C. Mott, the Judge Advocate General of the Navy, who was sched-



John Stone



Norman Ross

uled to speak at the Banquet of the Regional Meeting, was hospitalized and unable to attend. His place was taken by Norman Ross, the well-known commentator from Chicago, who offered some provocative thoughts on the problems of the free world in the Cold War.

Among other things, the visitors learned the meaning of "Hoosier hospitality" at Indianapolis, since the hosts made sure that any time not spent on business was not wasted. The program for Thursday evening began with a complimentary reception at the Claypool Hotel, for all registrants preceding an informal dinner in the magnificent Indiana Roof Ballroom. One of the highlights of the meeting was the musical show staged by the Indiana University Belles.

On Friday, preceding the Banquet of the Regional Meeting, the Indiana

State Bar Association and the Indianapolis Bar Association were hosts at another reception, and on Saturday, the final day of the meeting, all registrants were invited as special guests at the Indianapolis Motor Speedway to watch the speed-qualification tests for the five-hundred-mile Memorial Day race.

One of the things that made the meeting so pleasant was the weather, which must have cost the hosts some pains since it was the first warm weather of the year for the Midwest. Throughout the meeting, the weather was bright and sunny, showing off the fresh green of the Indiana springtime and the beauty of the lilacs and the redbud and the apple trees which were in full bloom.

It was truly a memorable meeting.

The following letter from the Director of the Federal Bureau of Investigation was recently received at the Headquarters of the American Bar Association:

"It is indeed a pleasure to extend greetings and congratulations to the American Bar Association upon the opening of the new annex at its Chicago Headquarters.

"This is a significant milestone in the growth and progress of the Association since it was founded in 1878. With a membership now some 100,000

strong, the organization may indeed be proud of its accomplishments in promoting the American way of life. Over the years it has crusaded for improvement in the administration of justice, high standards of legal education and conduct and professional integrity in the field of jurisprudence.

"We of the law enforcement profession look to the Association as an ally in the common fight against the evil forces of crime and subversion. The

challenge is unmistakably clear. Our Nation's future and the welfare of our people demand that it be met. We exist as free men today because only under law can individual rights prosper.

"I welcome this opportunity to salute the members of the American Bar Association on a job well done and to convey my very best wishes for every success in their future endeavors.

JOHN EDGAR HOOVER
Director"

Books for Lawyers

HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD. By Louis G. Silverberg. Washington, D. C.: Bureau of National Affairs, Inc. 1959. \$7.85. Pages 386. (Reviewed by John J. Coleman, Jr. Mr. Coleman has practiced law with a large Birmingham, Alabama, law firm since his admission to the Bar in 1950.)

This book, written by a former Director of Information for the National Labor Relations Board, has been aptly described as "the NLRB dictionary, manual, and reference *par excellence*". Its basic purpose, according to author Silverberg, is "to acquaint those—either laymen or lawyers—who come before the Board with the proper procedures in the handling of their cases".

Mr. Silverberg's work is not merely a compilation of rules and regulations, but is more in the nature of an exposition of the procedural steps involved in the presentation of a case before the Board from the filing of the initial petition or charge to the ultimate decision. At the outset of the book is a generic discussion of the substantive provisions of the National Labor Relations Act which the Board administers and enforces. This is followed by a concise but adequate treatment of the relationship between the National Labor Relations Board on the one hand and the Office of the General Counsel on the other, and the structure and functions of each. The balance of the book is in large part devoted to a perceptive analysis of the procedures, practices and policies applicable to unfair labor practice and representation proceedings at each step of their administrative development. The author has supplemented the textual discussion with "flow charts" which depict graphically each procedural step and with facsimile reproductions of more than fifty forms utilized in NLRB proceedings by the

Board and its Regional Offices. A most useful and lucid treatment is afforded to the subject of "How, Where, and When To Serve Papers", which includes in convenient tabular form, with respect to all types of motions, petitions and other documents, the answers to such questions as whom to serve, when, where, the number of copies, etc.

The book is comprehensively indexed and the textual material is accompanied by adequate—selective rather than profuse—citations of pertinent authorities.

By way of caveat, it should be noted that this book antedates the Labor Management Reporting and Disclosure Act of 1959 and hence does not deal with changes in the National Labor Relations Act accomplished by the LMRDA or reflect attendant revisions in and additions to Board procedures. Thus, the author's discussion in one chapter of the subject of union filing requirements under the NLRA is now largely academic and there is no mention made, for example, of the new expedited election provisions of the Act and the regulations pertinent thereto. Despite these unavoidable shortcomings this book is a most useful aid to the lawyer who must deal in the labor relations field, since the great bulk of the Board's procedures and practices remain substantially as before. Both the general practitioner with labor problems and the labor specialist will find it, on the whole, authoritative and most helpful.

PRESIDENTIAL TRANSITIONS.

By Laurin L. Henry. Washington, D. C.: The Brookings Institution. 1960. \$7.50. Pages xx, 755. (Reviewed by William F. Swindler, Professor of Law at Marshall-Wythe School of Law,

College of William and Mary, in Williamsburg, Virginia.)

This is—or was, in the fall of 1960 when it came off the press—a striking and timely example of the research into significant details of government and constitutional functions which is the specialty of the Brookings Institution. The book reportedly became an immediate reference manual for the members of the Executive Department, both outgoing and incoming, who were responsible for expediting the change-over from the Eisenhower to the Kennedy Administration. But it has become almost commonplace for Brookings studies to be snapped up by the federal departments to whose functions and problems they are addressed—so competent and pertinent are the studies, and so complete the absence of any other research agency of comparable standing in this rich field.

The Brookings Institution originated in the concern of one man—Robert S. Brookings, St. Louis philanthropist—at the lack of any facility for scholarly study of the American governmental and economic structure. Almost from the outset, Brookings has been responsible for trail-blazing: Its 1934 publication of Blachley and Oatman's *Administrative Legislation and Adjudication* was one of the earliest volumes on this subject, and it was accompanied by a series of monographs on specific federal agencies which, though in need of rewriting today, are models for any contemporary work in these areas. Its four volumes on aspects of the depression of the 1930's—while subjected to criticism that they were apologetics for the *status quo*—have remained standard references for that period in our history.

Since World War II, research at Brookings has shown an even greater instinct for the significant which is typified by *Presidential Transitions*. Dr. Henry's volume is the seventh in a series of published studies of electoral and governing processes which have been coming off the presses since 1957; and at least one more volume is in prospect. These volumes, covering such subjects as executive training for government service, the politics of party conventions and presidential campaigns, and the role of the opposi-

tion party leadership in a democracy, make up a working library on American government which is of the highest value.

While the timeliness of the Henry book was pointed up in the fall of 1960, it will remain a significant reference for many future presidential transitions. This is true because it does not confine itself to the 1952-53 Truman-Eisenhower changeover, but covers three other transitions in this century—the Taft-Wilson relations of 1912-13, the transfer from Wilson to Harding in 1920-21, and the transfer from Hoover to Franklin D. Roosevelt in 1932-33.

"In a strictly legal sense," the author observes in his foreword, "the installation of a new President of the United States is simply a matter of repeating the oath of office on inauguration day. But the transfer of effective governmental power symbolized by the inauguration ceremony is a complex process, which begins long before inauguration day and continues long afterward." Vital as this phase of federal function is, it has not received any attention to speak of, prior to this Brookings project—nor, as a matter of fact, did it seem worthy of much attention among the Chief Executives themselves, until the changeover from Hoover to the second Roosevelt. Woodrow Wilson was casual in his succession to Taft and broken when he passed from the scene at Harding's inauguration. But by 1933, the age of crises had begun, and ever since, it has been recognized that the continuity of the executive process was too vital to the domestic and foreign affairs of the nation to continue its aimless tradition. The teams of Eisenhower-Kennedy officials who set to work in November and continued through January to engraft a new administration on a 170-year mainstem are following a procedure which is likely to continue from now on.

This book, to a limited degree, is also a short study of the Presidency in action in the twentieth century, due to Dr. Henry's editorial plan of following the four Presidents—Wilson, Harding, F. D. R. and Eisenhower—far enough into their administrations to make clear when the transition from a prior administration came to an end and the

new Chief Executive was settled into a program in his own mold. The subject is studied in the several aspects, too, of foreign affairs, fiscal policies, administrative operation, and the practical relations between the White House and the Congress. Obviously and of necessity, the incoming administration seeks to avoid committing itself to continuing things in the philosophical context of the retiring President. But continuity there must be, whether it is the disjunctive movement from Taft to Wilson, the rush to the pork barrel under Harding, the politically coy approach of Roosevelt, or the cool protocol between Truman and Eisenhower.

By the way—the book is highly readable in the bargain. Virtually all of Dr. Henry's materials are based upon published sources, ranging from government reports to contemporary newspapers and magazines. The human motives and foibles show clearly through the official trappings. If *Presidential Transitions* did not make the best seller lists, it should have—and very likely would have if it had appeared earlier in the absorbing sequence of events of 1960. It deserves a steady sale through the years, among all who are interested in the executive function in the federal organization of government in the United States. It will rest on the reference shelves on this subject beside the classic study of the office and powers of the presidency by Edward Corwin (the fourth edition of whose study was published by New York University Press in 1957) and that other 1960 title on the presidency which was written by Richard Morris—*Great Presidential Decisions* (Philadelphia: Lippincott, 1960). Now what we need to complete the shelf is a new edition of something like Edward Stanwood's *History of the Presidency*, last published in the 1920's. With the excellent work which Brookings is doing in this field, perhaps that will eventually come about.

CAUSATION IN THE LAW. By H. L. A. Hart and A. M. Honore. Oxford: The Clarendon Press. 1959. \$8.80. Pages 454. (Reviewed by Lester M. Denonn. Mr. Denonn is a 1928 graduate of New York University Law

School and practices law in New York City.)

Your reviewer's attention was directed to this painstaking volume by two notices in the September 9, 1960, issue of the *London Times Supplement*. The first item had this frank reference: "The print is too small for the subject and the length of the work will militate against its having any real influence on the overworked practical lawyer." It is too bad that the British custom of anonymity prevents due recognition for the author of this critical gem. The second reference was in an article entitled *The Post-Linguistic Thaw: Getting Logical Conclusions Out of the System*. The system referred to is the Oxford linguistic philosophy exemplified in the work of Gilbert Ryle and others in the Oxford group to which the authors adhere. This school has delighted in tearing apart all problems of philosophy by tossing hither and yon all the concepts employed in common sense usage as well as in speculation. The *Times* article states: "The province of jurisprudence offers an almost ideal ground for the application of a critical technique of which the essence is an accurate surveying of the actual operation of concepts."

Such, indeed, has been the aim and accomplishment of these authors. They treat the concept of causality wherever found and apply the usages adopted to the problems of the law. They are critical of the philosophic analyses of Hume and Mill in particular and throw their emphasis upon the common sense view of what constitutes a cause with the resultant thesis, exemplified by opinions that the law seeks its answer to the problem of causation from the common sense notions rather than from philosophers.

They consider the concept of cause as it has been attacked in cases involving torts, contracts and the criminal law, but point out that it is a problem common to these fields and not peculiar to nor distinct in each.

They review the discussions of the subject by British and American writers and by continental thinkers, particularly the German theorists. There is an interesting reference to the Model Penal Code.

Among the philosophic notions con-

sidered are such terms as cause, effect, results and consequences with an attempt to distinguish the cause from the consequences. When the authors turn to what they characterize as the common sense approach of the courts and the juries, they merely inquire into what it is that brought the event in question into being. They look for the contingency, usually some human intervention which initiated a series of physical changes, and then to the necessary refinements of causal connection by consideration of proximate causes, remote antecedents and superseding causes. But it is not all so simple as the 450 pages amply demonstrate.

The authors note an attempt in modern theory to free decisions from extended analyses of causative factors and suffer the results to depend upon policies of justice or expediency. They do not believe that there is adequate justification for such a position. They find more in the practice of the courts than a mere blend of *sine qua non* and policy.

The authors also note that Continental theorists, other than the French, stress the philosophic basis of cause rather than the common sense approach or the empirical approach of common law. Despite a variety of causal expressions in the various codes, they find the theorists treat causal connection as a uniform and unvarying element in legal responsibility.

The entire discussion serves to emphasize the frequency with which the problem of causation comes before our courts. One need not look far for citations further illustrative of the importance of the subject. As recently as July of last year, the New York Court of Appeals in *Miller v. National Cabinet Co.*, 8 N. Y. 2d 277, had occasion to grapple with proof of causation in a leukemia case. Their extended consideration of the serious problem led to a decision by a divided court. This is but one more instance of the significance of the subject to be added to the eighteen pages of citations of British and American cases furnished by the authors.

COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES. By Chester James Antieau.

Buffalo: Dennis & Co., Inc. 1960. \$10.00. Pages xl, 416. (Reviewed by John Raeburn Green, of the St. Louis, Missouri, Bar. Mr. Green has practiced law in St. Louis for many years. The United States Supreme Court appointed him to represent habeas corpus petitioners in 1944 and in 1952 he was appointed special master in Texas v. New Mexico, the Rio Grande litigation.)

This compact volume considers the Constitution in two different aspects: (1) as a limitation upon state power and as a source of state obligation; and (2) as a source of federal power and as a limitation upon the activities of the Federal Government.

In the first of these divisions, Professor Antieau (who is Professor of Law at the Georgetown University Law Center) deals, in concise and orderly fashion, with nineteen different topics; in the second with eleven. Considering the advance of federal power which our generation has witnessed, this numerical disparity is not surprising. The Constitution is not treated clause by clause, but according to the subject-matter affected by the powers, activities and obligations which may result from the impact of one clause of the Constitution or, occasionally, from the impact of several (e.g., Congress' power to investigate, limited by several constitutional provisions). A comparison with Part II of Chancellor Kent's *Commentaries* shows how far we have progressed since the simpler and perhaps happier days of that authority.

Illustrative of Professor Antieau's treatment is his first topic, "State Interference with Interstate and Foreign Commerce", which comprises approximately one fourth of the volume. This is broken down into six subtopics, five of which are based on the method of interference: inspection regulations, quarantines, control of the liquor traffic, taxation (eleven sub-subtopics) and "Other Regulations" (twelve of these, one of them being occupation of the field). The arrangement is essentially a practical one, most convenient and useful.

Professor Antieau reviews the cases topic by topic, thoroughly, but concisely and with brevity. In the main his

book is a dispassionate summary of constitutional law as the Supreme Court has proclaimed it, but Professor Antieau does not always stop with an analysis of the decisions. Sometimes (most often in the topics dealing with the limitations on state power arising from the Bill of Rights) he adds incisive criticism of recent decisions, and comments as to the future. The reader may wish that he would do this more often, even though realizing that the volume is intended to be a summary of constitutional law as it is, not as it ought to be. Thus, in Professor Antieau's review of *Dennis v. U. S.*,¹ one admires his rigorous self-restraint, but regrets that he felt it necessary to confine himself to a footnote reference to his four law review articles on clear and present danger.

This compendium will be useful not only to the law student, but also, because of its comprehensive scope, to the practicing lawyer, who will find here, at the least, a starting point for his research.

BASIC CORPORATE PRACTICE. By George C. Seward. Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. 1960. \$3.00. Pages xiv, 178. (Reviewed by Leonard D. Adkins, of New York City, Vice Chairman of the American Bar Association's Section of Corporation, Banking and Business Law.)

The first edition of this handbook was published in 1957 and more than 5,000 copies of that edition were sold. In view of the popularity of the handbook, Mr. Seward (who wrote the original handbook) was asked to revise it and bring it up to date.

Mr. Seward has most successfully condensed into less than one hundred pages of text (exclusive of forms) the essential basic information necessary for the organization and operation of a corporation. It is intended primarily for lawyers called upon to advise clients on corporate matters who have not had great experience in that field. Accordingly, it has been made clear and simple, but without sacrificing any important necessary information.

1. 341 U.S. 494 (1951).

The first chapter discusses in some detail the advantages and disadvantages of the corporate form of organization as compared with other methods of doing business. Naturally a large part of this discussion deals with tax problems.

The second chapter deals with the organization of a corporation, the possible varieties of capitalization, the selection of the state of incorporation, the selection and protection of the corporate name, and the drafting of the certificate of incorporation and by-laws.

The third chapter deals with the routine action necessary to keep the corporation going, particularly matters of tax returns and reports and meetings of stockholders and directors.

The fourth chapter discusses problems of raising capital, particularly the various types of securities or obligations which may be appropriate for various situations and the requirements of the state blue sky laws and the Federal Securities Act.

The fifth chapter deals with special problems of closely held corporations, including methods of maintaining control, protecting voting rights, maintaining veto powers and avoiding deadlocks.

The sixth chapter discusses the types and sources of dividends, the procedures for declaring dividends and the procedures to be taken by the directors to protect themselves against liability.

The seventh chapter deals with the procedures for acquiring or disposing of a business, either by purchase or sale of stock or by purchase or sale of assets.

Those chapters cover fully and clearly the basic information necessary to advise a client as to whether a corporation should be organized, how to organize a corporation, if that be the conclusion, and how to carry on ordinary activities after the corporation is organized.

The remainder of the handbook consists of forms which obviously have been taken from the actual experience of the author. The most important forms are probably those for the certificate of incorporation and by-laws, prepared in the light of Delaware statutes. There are also included such

forms as stock certificates, minutes of various meetings and agreements to purchase stock and assets.

Mr. Seward's book has two great merits. It is short and simple and would clarify for an inexperienced practitioner many problems of corporate law which must be solved, but of which he might not even be aware. On the other hand, it is a comprehensive treatment of the subject and the experienced corporate lawyer reading the book will find that most subjects within its scope have been adequately dealt with.

The forms are so set up as to be usable substantially without change for almost any corporation organized under the Delaware law and so as to be relatively easily adaptable for corporations organized under other laws.

Mr. Seward has done a great service to the profession by revising the handbook, not only because there have been some changes in the applicable laws since the first edition but, even more important, because he has been able to add important material not included in the first edition.

TAXATION OF FOREIGN INCOME. By Boris I. Bittker and Lawrence F. Ebb. Stanford, California: International Legal Studies Program, Stanford University Law School. 1960. \$5.00. Pages 580. (*Reviewed by Thomas E. Costner. Mr. Costner will complete his studies for an LL.B. degree at the University of Virginia this month and will spend a year of graduate legal work at the Sorbonne in comparative law beginning next fall.*)

This book, by Professor Bittker of Yale Law School and Professor Ebb of Stanford Law School, is a welcome addition to the bibliography of the international taxation field for at least two reasons: it is the first comprehensive case and textbook dealing with the taxation of foreign income, and secondly, it is a generally excellent presentation of the subject. Heretofore those relatively few law schools which offered courses in the taxation of foreign-source income have had to assemble home-made materials which directed reading to selected cases and outside materials, some of which were not readily available. This problem has in

large part been solved by the current publication which collects within one volume a representative selection of cases in the field of foreign taxation, plus related treaty materials and editorial notes. A possible by-product of the appearance of this text is the more widespread offering of courses in foreign taxation which has been restricted to those schools fortunate enough to have faculty experts in the field or visiting practitioners available.

This publication deals mainly with the income tax laws of the United States as applied to income derived from foreign sources by residents and nationals of the United States, and to income derived from American sources by foreign corporations and non-resident aliens. Tied in with the principal study of United States income tax provisions is some use of foreign cases, treaties and statutory material to interrelate the impact on our tax structure of bilateral tax conventions. As indicated by the title, the emphasis is on income taxation, but some attention is given to taxes arising from related international transactions: inheritance, property, sales and other taxes.

The authors suggest the possible use of their book in courses relating to international taxation, such as international transactions, trans-national law and conflict of laws. This writer agrees that the materials lend themselves to presentation outside the strict field of foreign taxation. It has become a cliché to say that the field of international business operations by United States corporations is rapidly expanding. Therefore it is a danger inherent in the publication of any new work in the foreign field that it will become rapidly dated. Bittker and Ebb were obviously aware of this when they selected and assembled their materials. They have made a successful effort to include very timely information, yet select it sufficiently carefully so that it will not become quickly obsolete. Probably the best example of this is their presentation of the section entitled "International Transportation Industry". The materials here are as current as possible, yet state that it is a constantly changing area of the law and attempt to indicate some of its new directions in the future.

From a good introductory section detailing the bases for taxation of foreign income the authors move to, as they call it, a "bird's-eye view" of the relevant American laws pertaining to taxation of foreign income. This gives the reader a good idea of the scope of the American laws in easy-to-read form before a detailed study of them is undertaken. One of the text's good features should be pointed out here: the inclusion in the appendix of all pertinent sections of the current Internal Revenue Code. From this preliminary look at the American tax law the authors move to a detailed discussion of the competing methods of engaging in foreign business, mainly branch and subsidiary types of operation. The treatment in this section of specialized tax provisions dealing with Western Hemisphere Trade Corporations, China Trade Act Corporations, and "Possessions" Corporations is quite thorough.

The most outstanding treatment contained in the book is the hundred pages devoted to income tax treaties and their impact on the national taxation of foreign income. Bittker and Ebb give a particularly good coverage of this important subject. The material on licensing, while brief, is clear and gives ample collateral citation. Also the editorial notes and queries throughout are well-written. The one area which possibly requires revision and bolstering is that section dealing with "Fluctuations in Foreign Exchange". Some of the problems here are complicated by the use of hypothetical currency transactions. Aside from this criticism, which is a minor one, Professors Bittker and Ebb are to be commended for their much-needed contribution to the international tax field.

EQUAL JUSTICE FOR THE ACCUSED. By a Special Committee of The Association of the Bar of the City of New York and the National Legal Aid and Defender Association. Garden City, New York: Doubleday & Co. 1959. \$3.50. Pages 144. (Reviewed by Daniel J. Meador, Associate Professor of Law at the University of Virginia.)

Surely a unique and laudable abnegation of power is found in society's furnishing counsel for one against whom society through a criminal pros-

ecution otherwise pits all its resources. Only a government under law confident of its foundations could afford such a luxury. Indeed adequate provision for counsel for all indigent persons accused of crime might well be a test of the level a civilization has reached. But if so, the United States fails to measure up to where it generally thinks itself to be. The full picture is set forth in *Equal Justice for the Accused*, a careful survey made by a committee of The Association of the Bar of the City of New York and the National Legal Aid and Defender Association. This report also analyzes and evaluates the chief means which can be and are employed to furnish counsel for indigents.

The United States Constitution, with the help of the Supreme Court, has gone a long way toward insuring that a criminal defendant has representation. The Sixth Amendment now requires that in every federal prosecution counsel be provided if the defendant cannot obtain his own. But in state courts the matter is less clear. Since *Powell v. Alabama*, 287 U. S. 45 (1932), the due process clause of the Fourteenth Amendment has required counsel in state capital cases. But as long as the shaky distinction made in *Betts v. Brady*, 316 U. S. 455 (1942), stands, many indigents in state non-capital prosecutions have no constitutional right to counsel; the right there exists only if the court believes that "special circumstances" necessitate a lawyer. State non-capital cases of course make up the bulk of everyday criminal litigation, and it is with these accused that this report is concerned. And it is in this area that the Bar's great unfinished work lies. For while many states and localities have taken substantial steps to close the gap, many have done little.

The three basic systems examined are assigned counsel, voluntary defender and public defender. Each is described in general and then each is viewed empirically in several widely scattered communities across the country. From their study the writers of the report have developed six standards which should be found in any ideal system for furnishing indigent representation. The three systems are then

tested against these standards in a dual light: (1) is the system inherently capable of meeting the standards? and (2) does the system in practice meet the standards? From this emerge the strengths and weaknesses of each system and some recommendations for the future. While the assigned counsel method generally seems to fare poorest, particularly in urban areas, the writers point out that what is good for one community may be inadequate for another. Factors such as population, number of indigent accused, conditions within the local Bar and available money must be considered.

This is an excellent guidebook for bar associations or other organizations. Few places have functioning systems of any type which could not profit from reappraisal. And for the hundreds of localities with no organized means of making counsel available to the poor, there is perhaps no better source book for the experience of others and for a sound consensus as to what needs to be done and how it can be done. In this undertaking there need be no fear of weakening the prosecution of crime nor of protecting the guilty; the challenge is to maintain our heritage of equality before the law for criminally accused—as the committee says, "to keep effective those safeguards that give meaning to the 'presumption of innocence'".

JOSEPH STORY: A COLLECTION OF WRITINGS BY AND ABOUT AN EMINENT AMERICAN JURIST. Selected and edited by Mortimer D. Schwartz and John C. Hogan. New York: Oceana Publications, Inc. 1959. \$5.00. Pages 228. (Reviewed by William H. Edwards. Mr. Edwards is a senior partner in a large Providence, Rhode Island, law firm.)

This rather brief anthology (of prose) by and about Justice Story, one of the judicial paragons of our national history, is an interesting and stimulating book. It follows, in general, the scheme of other similar books put out by this publisher concerning well-known judges.

Story was a man whose achievements make most other lawyers seem like pygmies. He knew so much and accomplished so much and worked so

hard and so thoroughly enjoyed himself that the ordinary lawyer, or even the ordinary judge must upon contemplating him throw up his hands in envious and apologetic despair.

Story was appointed to the Supreme Court by President Madison in 1811 at the age of 32, the youngest Justice in the Court's history before or since. He served on the Court for thirty-three years. Only Marshall, Field and Harlan the elder, each with a thirty-four-year record, have exceeded him in term of service. He was the friend, confidant and worshipper of Marshall. In 1829 he became the first Dane Professor of the Harvard Law School and for the last sixteen years of his life was the guiding hand of that new foundation.

As if the two burdens of court and law school were not enough, he was a copious writer of authoritative texts: on *Equity*, *Equity Pleadings*, *Conflict of Laws*, *Constitutional Law*, *Agency*, *Bailments*, *Bills of Exchange*, *Partnership*, *Promissory Notes*.

Dean Pound, whose essay on Story is printed here in part, says that the influence of Story's *Commentaries on the Constitution* is to be "traced through Cooley into nearly all the texts of the last part of the nineteenth century". As for his treatise on *Conflict of Laws*, Dicey (quoted by Pound) says that it "forthwith systematized, one might almost say, created a whole branch of the law of England".

Messrs. Schwartz and Hogan have, however, given us the giant in all his three dimensions. One chapter, for example, is on Story as a poet. Here Story was, not surprisingly, a failure, though his technique, derived from Pope, produced some amusing effects. One piece of verse was called "Advice to a Young Lawyer" and began "Keep, then, this first great precept ever near, / Short be your speech, your matter strong and clear."

This collection will, it is hoped, induce someone to write a new, full-scale biography of Story. The editors note in their excellent bibliography that the life by his son is not wholly satisfactory. Nevertheless it is good reading for lawyers. And it is pleasant too, as a literary footnote, to observe that this son, William Wetmore Story, the scul-

tor, was himself handsomely dealt with in a charming biography by his friend, Henry James.

Two minor items at least should be added to the bibliography in the book's next edition: Professor Simon Greenleaf's *Commemorative Discourse on Story* and a similar discourse by William Newell, pastor of the First Church in Cambridge. Each is extravagant in its praise but useful as a well-written summary of Story's remarkable career.

ANTITRUST LAWS OF THE U.S.A. By A. D. Neale. New York: Cambridge University Press. 1960. \$7.50. Pages 516. (Reviewed by Benjamin Wham, of the Chicago Bar, a member of the American Bar Association's Board of Governors and a former Chairman of the Association's Section of Corporation, Banking and Business Law.)

This single volume covers the entire field of antitrust comprehensively and well. This may be due in part to the fact that Mr. Neale is a British civil servant and brought to the task a fresh mind so that he could write from the point of view of the beginner, yet he was given sufficient time by the National Institute of Economic and Social Research to gain a remarkable insight, through the gyrations which bewilder even American lawyers, into basic principles of law and economic philosophy which govern antitrust.

The author's purpose was to write an account of the antitrust laws' actual working for the benefit of British businessmen and lawyers, but he surpasses this objective: He has made a solid analysis and a highly perceptive evaluation of American antitrust from which Americans themselves will derive much profit. As Abe Fortas in the foreword said: "He has mastered the strange language of this peculiar American institution, and he has penetrated to the heart of its meaning."

The book is divided into two parts:

Part I, amounting to three fourths of the book, describes the laws prohibiting monopolies and restrictive agreements in the U. S. A. and discusses the decisions reached by the courts in leading cases. It also includes a description of administrative processes by which the laws are enforced. The beginner in antitrust or general practitioner will

find very illuminating the introduction which outlines the antitrust laws, defines the various terms and analyzes the aim and scope of antitrust. For example, at page 13 and following is an excellent statement concerning the Rule of Reason and *per se* rules.

Part II assesses the value and meaning of the antitrust system in relation to the historical and social reasons for its adoption and its continuing vitality in the U. S. A., and considers how far antitrust is a model for other countries, particularly the United Kingdom.

This task has been remarkably well done. As Abe Fortas stated in the foreword: "I know of no other single volume which covers the entire field of antitrust so comprehensively and so well."

WATER PURITY: A STUDY IN LEGAL CONTROL OF NATURAL RESOURCES. By Earl Finbar Murphy. Madison, Wisconsin: The University of Wisconsin Press. 1961. Pages x, 212. (Reviewed by Frank M. Covey, Jr., who is in practice in Chicago and is Chairman of the Committee on Cooperation with the Junior Bar Conference of the Section of Local Government Law.)

In a recent Public Health Service hearing on water pollution, a Louisiana farmer testified that ninety-five of his one hundred and forty cattle died from drinking the water in a creek that ran by his farm. When the creek overflowed it killed the trees along the banks and rendered over two thirds of the farm unfit for growing crops. A local sportsman added that every form of life in the creek had been killed, even frogs.

In the area of Sioux City, the Public Health Service engineers report the Missouri River is covered with floating excrement and obvious sewage solids and that the junction of the Floyd and Missouri Rivers is almost clogged with untreated packing plant wastes.

In September of 1960 the United States Government filed suit against the City of St. Joseph, Missouri, to stop the city from pouring raw sewage and untreated industrial wastes into the Missouri River. That suit is still pending, but, twenty-four miles south and downstream of St. Joseph, the City of

Atchison, Kansas, takes its water supply from this same river—untreated sewage and wastes notwithstanding.

These foregoing examples indicate clearly that water pollution, with its accompanying spread of disease, increased cost of certain businesses, fish- and wildlife-kills and the destruction of a vital natural resource, is one of the most pressing problems facing this country. It is not, however, a new problem in spite of its current importance. The law has long grappled, with varying degrees of success, with the problem of preserving water purity and preventing or controlling water pollution.

Water Purity is a study of the development of the law of water pollution and the attempts, by the State of Wisconsin in particular, to solve the problems presented by the increasing need for pure water and the growth of pollution in intensity and in sources. The author, who is Professor of Law at Temple University in Philadelphia, has treated the subject in a manner both scholarly and highly readable.

In this book, based on a study financed by a Rockefeller Fellowship in Natural Resources and conducted by Dr. Murphy at the University of Wisconsin Law School, the author traces the law's attempts to cope with the pollution problem through legislative means, the judiciary and finally through the administrative agency. Dr. Murphy concludes that only in the development of the administrative agency can water pollution control, or any other natural resource preservation program, achieve an effective legal implementation.

The author presents an excellent and thoroughly documented study of water pollution control in Wisconsin, but he has also done more than that. He has shown that resource management is successful only when implemented by an intelligently operated administrative agency which can cope with varying problems, weigh various interests and achieve a resource management program that maximizes resource preservation and minimizes adverse impact on

industrial and commercial development.

To achieve this, Dr. Murphy has gone behind the statutes and cases and has delved deeply into the state archives and records and has interviewed and observed private and public agencies active in the area of water pollution control. This section alone would make the book worthwhile as an accurate study of administrative operation, but coupled with the study of legal development it makes the book a *sine qua non* in natural resource law.

Water Purity is a well written and complete study of water pollution control in Wisconsin and a thoughtful commentary on resource management in general. It will be of great interest not only to lawyers active in resource preservation but also to anyone interested in the administrative process.

DEPRECIATION AND TAXES: A SYMPOSIUM. Princeton, New Jersey: Tax Institute, Inc. 1959. \$6.00. Pages viii, 248. (Reviewed by Harry K. Mansfield, of the Boston Bar, a member of the Council of the American Bar Association's Section of Taxation.)

Annually the Tax Institute, Inc., holds a symposium to focus attention on a major problem of taxation. This is only one of the several useful functions performed by the Institute. This publication collects in written form the discussion held in November, 1958, on the vital subject of tax policy with respect to depreciation allowances. The subject has been debated in many organizations, including the Section of Taxation, where proposals for fundamental changes were put forward by the Section's Committee on Depreciation at the August, 1960, meeting of the Section in Washington.

This symposium collection contains the views, set forth in layman's language, of fifteen experts from universities, industry, trade associations, from the professions of law and accountancy and from the Internal Revenue Service. Their differing viewpoints tend to reflect their backgrounds, and yet throughout there is evident an attempt to reach a reason-

able common ground for the betterment of our economy. The views expressed here have not suffered the depreciation of time. Their echoes can be found in the papers and statements presented to the panel discussion on income tax revision presented last year to the House Ways and Means Committee of the Congress. Perhaps they may eventually be reflected in the legislative program of the Treasury Department.

The papers are divided into four categories: the fundamentals of depreciation policy, depreciation and the changing price level, tax aspects and management decisions and considerations in depreciation reform. Even though depreciation policy has a significant effect on income computation for a variety of reporting aspects, the tax consequences of a particular depreciation policy are by all odds the most significant. And the most troublesome aspect of the tax problems revolves around the relationship of the depreciation allowance to capital gains treatment on the disposal of depreciable assets. Brady Bryson expresses the thought that if we ensure that depreciation allowances are properly taken, then the present treatment of gains and losses on depreciable property is right. However, many persons are concerned to avoid any necessity for precision in computing depreciation, and these persons frequently hold the opinion that the present favorable treatment for dispositions will have to give way before reform will come. As a practical matter, this certainly seems to be the case. Perhaps the results of the Treasury Department's depreciation questionnaire, which has been circulated to businesses throughout the country, will afford some guidance as to the need for further reform and the willingness to compromise.

In any event, an intelligent consideration of this important economic problem can be founded upon the materials published in this symposium. Certainly, tax technicians should be encouraged to consider the economic and administrative bases of their problems. This book is an excellent starting point in the field of depreciation.

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-IN-CHARGE

Antitrust Law . . . requirements contracts

Tampa Electric Company v. Nashville Coal Company, 365 U. S. 320, 5 L. ed. 2d 580, 81 S. Ct. 623, 29 Law Week 4237. (No. 87, decided February 27, 1961.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Reversed and remanded.*

This decision reversed holdings by the courts below that a twenty-year requirements contract for coal was unenforceable as a violation of Section 3 of the Clayton Act. The Court held that the lower courts had misconceived the relevant market affected by the contract.

Petitioner, a public utility in the Tampa, Florida, area, decided to expand its facilities in 1955. It contracted with respondents to furnish the expected coal requirements for two generating units for a twenty-year period. The contract provided for the use of not less than 225,000 tons of coal per unit per year, and it was contemplated that eventually ten times that amount would be needed. Aside from this contract, the total consumption of coal in peninsular Florida was about 700,000 tons annually, supplied by 700 dealers in the producing area. It was estimated that petitioner's maximum requirements would be about 1 per cent of the total coal of the same type produced and marketed from respondent's producing area. In 1957, before the first of the new generating units was opened, respondent advised petitioner that the contract violated the antitrust laws and that no coal would be delivered, forcing petitioner to obtain another supplier. Petitioner brought this suit in the District Court for a declaratory judgment that the contract was valid and for enforcement of its terms. The District Court granted re-

spondent's motion for summary judgment on the ground that the undisputed facts showed the contract to be a violation of Section 3 of the Clayton Act. The Court of Appeals affirmed.

The Supreme Court reversed and remanded, speaking through Mr. Justice Clark. The Court declared that even though a contract is an exclusive dealing arrangement, it does not violate the statute unless its performance will foreclose competition in a substantial share of the line of commerce affected. The Court reviewed the nine previous cases in which it had interpreted Section 3 of the Clayton Act, and derived three "guidelines" for deciding cases of this type. First, it said, the line of commerce must be determined. Here, the Court said, it would assume that the line of commerce was bituminous coal. Second, the area of effective competition in the line of commerce must be charted by careful selection of the market area in which the seller operates and to which the buyer can practicably turn for supplies, and, third, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. The Court felt that neither peninsular Florida nor the states of Florida and Georgia combined could be said to constitute the relevant market of effective competition in this case, since the 700 coal dealers who competed with respondent sold suitable coal in Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois, and the total bituminous coal produced by them in one year amounted to some 359,000,000 tons, of which 290,000,000 tons were sold on the open market. The Court said that this clearly indicated that the proportionate volume of competition foreclosed by the contract was "quite insubstantial".

Mr. Justice Black and Mr. Justice Douglas noted that they were of the opinion that the courts below were correct, and the judgment should have been affirmed.

The case was argued by Walter C. Chanler for petitioner and by Abe Fortas for respondent.

Criminal Law . . . inconsistent counts

Milanovich v. United States, 365 U.S. 551, 5 L. ed. 2d 773, 81 S. Ct. 728, 29 Law Week 4265. (No. 79, decided March 20, 1961.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Judgment affirmed in part and in part set aside and remanded.*

This decision held that the trial judge erred in instructing the jury that one of the petitioners could be convicted both of stealing and receiving stolen currency.

The petitioners were husband and wife, both convicted in a federal district court for stealing several thousand dollars from a commissary store at a naval base. The wife was convicted also on a separate count for receiving and concealing the stolen currency. Both received terms on the larceny count, and the wife received a concurrent five-year sentence on the receiving count. It appeared (the details are given only in one of the dissenting opinions) that the petitioners transported three others under an agreement whereby the three were to break into the naval commissary and steal government funds. The petitioners were to wait outside until the three returned, but instead they drove off without waiting. Not finding the petitioners' automobile, the thieves buried the booty. Seventeen days later, the wife removed some of the booty and it was discovered on her premises by agents of the FBI. Counsel insisted

Reviews in this issue by Rowland Young.

that the petitioners could not be convicted both of stealing and receiving, and the trial court directed a verdict of acquittal on the receiving count insofar as the husband was concerned, but denied a motion for acquittal filed on the wife's behalf. The Court of Appeals set aside the wife's sentence for receiving in the light of the Supreme Court's decision in *Heflin v. United States*, 358 U. S. 415, which held that a defendant could not be convicted and cumulatively sentenced for both robbing a bank and receiving the proceeds of the robbery.

Speaking for the Supreme Court, Mr. Justice Stewart held that the Court of Appeals was correct, and went on to order a new trial on the ground that the judge should have instructed the jury that a guilty verdict could be returned upon either the stealing or receiving count, but not upon both. There was no way of knowing, the Court said, "whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither)". The Court affirmed the judgment as to the husband.

Mr. Justice Frankfurter, joined by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker, wrote a dissenting opinion which argued that the wife's participation in the larceny and her subsequent retrieval of the loot were legally separate activities.

Mr. Justice Clark, joined by Mr. Justice Whittaker, wrote a dissenting opinion which pointed out that the court's ruling in effect held that the jury should have been instructed that it return a not guilty verdict on one count or the other, yet in fact this would be a false verdict.

The case was argued by J. Hubbard Davis and Raymond W. Bergan for petitioners and by J. F. Bishop for the United States.

Criminal Law . . . second-offender statute

Reynolds v. Cochran, 365 U. S. 525, 5 L. ed. 2d 754, 81 S. Ct. 723, 29 Law Week 4277. (No. 115, decided March 20, 1961.) *On writ of certiorari to the Supreme Court of Florida. Reversed and remanded.*

This decision reversed petitioner's

conviction for being a second offender on the ground that his request for counsel in the second-offender hearing was not granted. The Court did not reach the more interesting question of the validity of the second-offender statute involved.

In 1956, petitioner was convicted of grand larceny in a Florida court. He was released in December, 1957, with time for good behavior and was discharged an absolutely free man. Two months later, an information was filed against him charging that he had been convicted of two felonies under the laws of Florida and was therefore subject to that state's second-offender statute. The first felony was a 1934 conviction for robbery for which the petitioner had also completely served his sentence. According to the petition, the defendant requested counsel when he was brought to trial but was told by the court that counsel would be of no assistance to him since he admitted the two convictions. The court sentenced him to ten years in prison. The Florida Supreme Court later denied a petition for habeas corpus.

The Supreme Court reversed and remanded, speaking through Mr. Justice Black. The petition alleged that the second-offender conviction was not authorized by the Florida statute and that it violated both state and federal constitutions. The Court decided the case on the denial of counsel issue, saying that the facts fell within the doctrine of *Chandler v. Fretag*, 348 U. S. 3, which had held that a multiple offender has a constitutional right to the assistance of his own counsel in a multiple-offender proceeding. The Court pointed out that counsel might have found defects in the 1934 conviction that would have precluded its admission in the multiple-offender proceeding and that the proceeding involved a difficult question of Florida law, since the Florida Supreme Court has never passed on the question whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction. The very existence of these difficult questions indicated the petitioner's need for counsel, the Court declared.

The case was argued by Claude

Pepper, acting under appointment of the Court, for petitioner and by George R. Georgeiff for respondent.

Evidence . . . admissibility of confession

Rogers v. Richmond, 365 U. S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735, 29 Law Week 4269. (No. 40, decided March 20, 1961.) *On writ of certiorari to the United States Court of Appeals for the Second Circuit. Reversed.*

Because the trial judge apparently took into account the circumstance of probable truth in holding that petitioner's confession of murder was voluntary, the Supreme Court here reversed the conviction and remanded either for retrial or discharge of the prisoner.

Petitioner was convicted of murder in a Connecticut court over his contention that confessions which he had signed had been coerced. Testimony of police officers flatly contradicted the prisoner and the trial judge concluded that the confessions were voluntary and allowed the case to go to the jury. The state Supreme Court of Errors found no error in the admission of the confessions and affirmed the conviction.

On petition for habeas corpus, the Federal District Court held a hearing and took the testimony of the petitioner and three police officers. The District Court concluded that the confessions were the result of pressure brought upon petitioner by the police, but the Court of Appeals vacated the judgment on the ground that it was error to hold a *de novo* hearing on issues of fact that had been considered and adjudicated by the state courts. The Supreme Court denied certiorari, noting that it read the Court of Appeals' ruling to hold that while the District Judge might accept the state court proceedings, "he need not deem such determination binding, and may take testimony". On remand, the district judge considered himself bound by the state court's findings and ruled that he could not find that the confessions were the product of coercion. The Court of Appeals affirmed, one judge dissenting.

Mr. Justice Frankfurter, speaking for the Supreme Court, reversed on the ground that the state courts had failed

to apply the standard demanded by the due process clause of the Fourteenth Amendment in determining the admissibility of the confessions. The rule was clear, the Court said, "that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." Here, in finding the confessions voluntary, the trial judge had found that "the pretense of bringing petitioner's wife in for questioning 'had no tendency to produce a confession that was not in accord with the truth'". The same view, said the Court, entered into the opinion of the Supreme Court of Errors—that the probable reliability of a confession is a circumstance of weight in determining its voluntariness. This, said the Court, was not a permissible standard of admission under the Fourteenth Amendment.

Mr. Justice Stewart, joined by Mr. Justice Clark, dissented on the ground that the appropriate inquiry was not the failure of the state courts to "verbalize the correct Fourteenth Amendment test of admissibility" but rather whether a confession was admitted that was in fact involuntary under Fourteenth Amendment standards. In this view, the case should have been remanded for a plenary hearing to determine that question.

The case was argued by Louis H. Pollak and Jacob D. Zeldes for petitioner and by Abraham S. Ullman for respondent.

Evidence . . . eavesdropping

Silverman v. United States, 365 U. S. 505, 5 L. ed. 2d 734, 81 S. Ct. 679, 29 Law Week 4249. (No. 66, decided March 6, 1961.) *On writ of certiorari to the United States Court of Appeals*

for the District of Columbia Circuit. Reversed.

In this decision, police eavesdropping by use of a "spike mike" attached to a heating duct in petitioners' house was held to be a violation of his Fourth Amendment rights. The Court based its holding on the fact that the eavesdropping was accomplished by an "unauthorized physical penetration" into petitioners' premises.

The record indicated that the police had reason to believe that a house occupied by the petitioners was being used as the headquarters of a gambling operation. With the permission of the owner of the adjoining row house, they employed a microphone with a spike about a foot long attached to listen in on conversations taking place in the suspected premises. The spike was driven into a crevice in the wall until it made contact with a heating duct, which then served as a sounding board.

The Court of Appeals affirmed the convictions, holding that the trial court had not erred in admitting the testimony of the police officers obtained from the listening device.

Speaking for the Supreme Court, Mr. Justice Stewart reversed. Petitioners had asked the Court to reconsider its rulings in *Goldman v. United States*, 316 U. S. 129, and *On Lee v. United States*, 343 U. S. 747. In *Goldman*, a detectaphone had been placed against a wall to listen to conversations taking place in the next office; in *On Lee*, a federal agent, who was acquainted with the petitioner, had entered his laundry and engaged him in an incriminating conversation. The agent had a microphone concealed on his person. In each of those cases, the Court had held that there was no violation of the petitioner's Fourth Amendment rights. The Court distinguished the present case on the ground that here there was a physical invasion of petitioners' premises. The Court insisted that its decision was not based on the niceties of local property law, but rather upon "the reality of an actual intrusion into a constitutionally protected area".

Mr. Justice Douglas, in a concurring opinion, argued that the "physical penetration" test applied by the Court was irrelevant and that the controlling

factor should be the invasion of privacy.

Mr. Justice Clark and Mr. Justice Whitaker, concurring, noted that they joined the Court's opinion in view of its determination "that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions".

The case was argued by Edward Bennett Williams for petitioners and by John F. Davis for the United States.

Patents . . . reconstruction

Aro Manufacturing Co. v. Convertible Top Replacement Co., Inc., 365 U. S. 336, 5 L. ed. 2d 592, 81 S. Ct. 599, 29 Law Week 4218. (No. 21, decided February 27, 1961.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Reversed.*

At issue here was whether the making of replacement fabric for a patented folding top for convertible automobiles infringed the patent. The Court held that it did not.

The patent was described as one for a "Convertible Folding Top with Automobile Seal at Rear Quarter", and consisted of a combination in an automobile body of a flexible top fabric, supporting structures and a mechanism for sealing the fabric against the side of the automobile body in order to keep out the rain. None of the components were patented. The components of the patented combination, other than the fabric, normally are usable for the lifetime of the car, but the fabric has a much shorter life and normally must be replaced after about three years' use. The petitioners manufacture replacement fabrics designed to fit various models of automobiles.

Respondent, which had a "territorial grant" of all rights in the patent, brought this action against petitioners for infringement. After a trial without a jury, the District Court held that the patent was valid and infringed, and accordingly it enjoined petitioners from further manufacture, sale or use of the replacement fabrics. It appointed a master to report on the matter of damages. The Court of Appeals affirmed, holding that the replacement of the fabric constituted reconstruction

of the combination and thus infringed or contributorily infringed the patent.

Mr. Justice Whittaker, speaking for the Supreme Court, reversed. The Court first determined that petitioner was not guilty of direct infringement, since the fabric was merely an unpatented element of the combination and separate elements of patented combinations are not covered by the patent. The Court then went on to hold that there was no contributory infringement because replacing the fabric was merely the replacement of a spent element, necessary to maintain "the use of the whole" combination. The Court said that reconstruction of a patented entity comprised of unpatented elements is limited to a true reconstruction of the entity so as to "in fact make a new article" after the entity, viewed as a whole, has become spent. "Mere replacement of individual unpatented parts, one at a time . . . is no more than the lawful right of the owner to repair his property", the Court said.

Mr. Justice Black wrote a concurring opinion that expressed complete agreement with the opinion of the Court and went on to answer specifically some of the points raised by Mr. Justice Brennan and Mr. Justice Harlan. Their opinions "attempt to introduce wholly unnecessary and undesirable confusions, intricacies and complexities into what has been essentially very simple under the opinions of this Court . . ." Mr. Justice Black declared.

Mr. Justice Brennan, concurring in the result, argued that, while the replacement of the fabric was "repair", not "reconstruction", the test enunciated by the Court was too narrow a standard of what constitutes impermissible "reconstruction".

Mr. Justice Harlan, joined by Mr. Justice Frankfurter and Mr. Justice Stewart, wrote a dissenting opinion which argued that there could be no single test to decide between "recon-

struction" and "repair". The dissent also argued that the courts below had applied the proper standards and the Court should not substitute its own judgment for theirs.

The case was argued by David Wolf for petitioners and by Elliott I. Pollock for respondent, and by Ralph S. Spritzer for the United States as *amicus curiae*, urging reversal.

Taxation . . . federal immunity

Laurens Federal Savings and Loan Association v. South Carolina Tax Commission, 365 U. S. 517, 5 L. ed. 2d 749, 81 S. Ct. 719, 29 Law Week 4275. (No. 126, decided March 20, 1961.) *On writ of certiorari to the Supreme Court of the State of South Carolina. Reversed and remanded.*

This decision held that advances secured by a federal savings and loan association from a federal home loan bank organized under the Federal Home Loan Bank Act of 1932 could not be subject to state documentary stamp taxes.

Petitioner, a federal savings and loan association in South Carolina organized under the Home Owners' Loan Act of 1933, has since 1953 secured "advances" totalling \$5,675,000 from the federal home loan bank. The state assessed documentary stamp taxes on the written promissory notes to the bank under a state statute. Petitioner paid the \$2,270 worth of taxes under protest and then filed this action in the state court for refund, contending that the advances were exempt from state taxation under the Federal Home Loan Bank Act. The State Supreme Court upheld the taxes on two grounds: first, that the exemption provisions of the Home Loan Bank Act did not apply to taxes imposed upon the borrowing savings and loan association, but only to the lending home loan bank; second, that the 1932 exemption had been im-

plicitly repealed as to transactions like this one by the Home Owner's Loan Act of 1932.

Speaking for a unanimous Supreme Court, Mr. Justice Black reversed and remanded. The Court said that the issue of exemption had been expressly determined in *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, which affirmed a holding that a Maryland statute imposing a stamp tax upon the recording of mortgages could not be applied to mortgages securing loans from the corporation. The fact that here the tax was assessed against the borrower instead of the lender was immaterial, the Court said, "because whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States".

The Court then turned to the state court's holding that the exemption had been repealed by the 1933 Home Owner's Loan Act. The provision relied on by the state court was Section 1464(h) of 12 U.S.C., which provides that "[N]o State . . . shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." The Court said that this language was intended to bar discriminatory state taxation of federal savings and loan associations, but was not intended to repeal the 1932 provision exempting the loan transactions from state taxation. The two statutes were designed to provide home owners with easy credit at low cost, were passed together within a year of each other on the basis of the same hearings, and, read together, form a consistent scheme to achieve the purpose of Congress, the Court declared.

The case was argued by Frank K. Sloan for petitioner and by James M. Windham for respondents.

What's New in the Law

The current product of courts,
departments and agencies

George Rossman . EDITOR-IN-CHARGE

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Attorneys at Law . . . malpractice

A California court has held that beneficiaries under a will may sue the lawyer who drew the will for faulty preparation of the instrument, either on the theory of negligence or third-party beneficiary, although there is no privity between the lawyer and the beneficiaries.

The decision was foreshadowed in 1958 in *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P. 2d 16, in which the Supreme Court of California ruled that a suit could be maintained against a notary public for defective execution of a will which caused the beneficiary to lose seven eighths of an estate. Until that case, however, the law of California, as established in 1895 in *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, had been that lack of privity precluded any duty arising from the preparer of the will to the beneficiaries and that accordingly there could be no action. In the instant case the California District Court of Appeal for the First District noted the *Biakanja* decision and declared that the law of California now permitted the suit.

The lawyer sued in this case made the privity argument, but to no avail. It was charged in the complaint that he placed a provision in the will that ran afoul of California law on restraints and suspensions of alienation and the Rule against Perpetuities, and that because of this the will was contested and the beneficiaries involved were forced

to settle the litigation for \$75,000 less than they would have received. Their complaint on this score contained a negligence count and a count alleging they were third-party beneficiaries of the contract between the testator and the lawyer.

The Court went along with the plaintiffs on both theories. To arrive at this conclusion, it first had to eliminate the problem of lack of privity. As to the negligence count, the Court noted not only the abandonment of the doctrine in *Biakanja*, but also pointed out that it had been dropped in cases of manufacturers' and suppliers' liability to consumers. It rejected a contention that the unauthorized practice of law aspects of *Biakanja* were controlling in its decision. "Rejection of the privity doctrine in this type of case is particularly justified because no other person can recover for the loss caused by the attorney's negligence", the Court declared.

As to the third-party beneficiary count, the Court referred to a statutory provision that a contract made expressly for the benefit of a third person may be enforced by him, and pointed out that the complaint stated that the testator's "primary and expressed intention" was to transmit a specific portion of his estate to the plaintiffs. It concluded that they had stated a cause of action as third-party beneficiaries.

A third count in the complaint alleged negligence in obtaining less-than-complete releases for the beneficiaries when they made the settlement with the will contestants. The Court also ruled that this count stated a cause of action.

(*Lucas v. Hamm*, District Court of

Appeal of California, First District, March 6, 1961, Shoemaker, J., 11 Cal. Rptr. 727.)

Criminal Law . . . criminal responsibility

In an exhaustive opinion by Chief Judge Biggs that will probably become a landmark, the Court of Appeals for the Third Circuit has discarded the *McNaghten* right-and-wrong test for criminal responsibility and has spelled out a formula of its own. Delving deeply into the subject, the Court found that the *Durham* test adopted by the United States Court of Appeals for the District of Columbia Circuit in 1954 is not entirely satisfactory.

In the case at bar, the defense requested both *McNaghten* and *Durham* instructions, but the trial court gave only the former, plus an irresistible impulse charge. The *McNaghten* rules, which take their name from *McNaghten's Case*, 8 Eng. Rep. 722, hold a defendant responsible for criminal conduct "if, at the time of the commission of the offense for which the defendant stands accused, the defendant was not able to distinguish right from wrong . . ." On the other hand, what has come to be called the *Durham* rule, promulgated judicially in *Durham v. U. S.*, 214 F. 2d 862, places the test of criminal responsibility on whether the defendant was suffering from a diseased or defective mental condition or mental illness when he committed the act, and the act was the product of the mental abnormality.

After refusing first to hold that psychopaths and sociopaths are "sane" as a matter of law, the Court turned to the *McNaghten* rules and concluded that they should not be applied in United States courts today. Tracing

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in *The United States Law Week*.

McNaghten's historical background, the Court pointed out that the "rules" are really answers to questions made by the judges of England to the House of Lords in 1843 after Daniel *McNaghten*, a man intent on assassinating the prime minister, mistakenly shot the prime minister's private secretary and was subsequently acquitted. But the "rules" were expounded as early as 1582 in *Lambard's Eirenarcha*, in a year, Judge Biggs remarked, "in which belief in witchcraft and demonology, even among well educated men, was widespread".

The *McNaghten* test is unworkable and a sham, the Court declared. It pointed out that a person might commit a criminal act believing it to be morally right. "Our institutions contain many patients", it said, "who are insane or mentally ill or mentally diseased and who know the difference between right and wrong. A visit of a few hours at any one of our larger state institutions within the circuit will convince even the lay visitor of the correctness of this statement. The test, therefore, of knowledge of right and wrong is almost meaningless." The Court stated that it was absurd to limit a skilled psychiatrist to answering one question—Did the defendant know the difference between right and wrong?—when one considers the "array of symptomatology" employed by psychiatrists in determining the mental condition of an individual. The Court concluded: "How, conceivably, can the criminal responsibility of a mentally ill defendant be determined by the answer to a single question placed on a moral basis?"

Moving on to answer other arguments, the Court found that it was not bound by any prior decisions of the Supreme Court of the United States; it read the decisions as not embracing the *McNaghten* rules to the exclusion of all others and it posited the belief that the Supreme Court would not apply the rules today.

The Court recognized criticism of the *Durham* test and it said that it does not present "the best or only feasible test". Then the Court declared:

We are of the opinion that the following formula most nearly fulfills the

objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

This formula is drawn, as Judge Biggs said in a footnote, from the test proposed to the American Law Institute in its Model Penal Code. It eliminates the Model Code's additional but disjunctive test that the defendant lacked substantial capacity "to appreciate the criminality of his conduct". Judge Biggs noted also that his test is similar to one proposed in England by the Royal Commission on Capital Punishment, which, he says, borrowed it from the British Medical Association.

One judge dissented in part. He said he was "not unmindful of the important contribution which the majority opinion makes in providing trial judges with more precise and scientific instruction for juries on the relation of mental disorder to criminal responsibility", but he did not think the *McNaghten* instruction was prejudicial in this case. He felt that the defendant would be treated for mental illness as a convict, whereas if on retrial he were acquitted, it would be doubtful that he would be restrained and receive psychiatric treatment.

(*U. S. v. Currens*, United States Court of Appeals for the Third Circuit, May 1, 1961, Biggs, C. J.)

Criminal Law . . .

let's be specific

"Andorian" buffs have another case for their collections. This one comes from the United States Court of Military Appeals and it concerns a Navy court-martial specification that charged that the accused did "wrongfully appropriate lawful money and/or property of a value of about \$755.51, the property of the United States".

The Court reversed the conviction on the ground that the specification lacked the required particularity to apprise the accused of the crime against which he must defend. It said that the inclusion of "this abominable combination . . . deprives the accused, appellate reviewing agencies, and those who may

in the future examine the charge, of any information concerning the nature of the *res* which he misappropriated". The Court complained that it couldn't divine whether the accused "took both money and property or only one of the two", or "whether he wrongfully sequestered the captain's gig, and perhaps thereby rendered the convening authority an accuser, or whether he utilized some Navy-furnished service which cannot be the subject of larceny".

The Court ruled that the fact that the accused pleaded guilty did not cure the defect, particularly since he was tried by a special court martial and was not represented by an attorney.

One judge dissented. He deplored the use of "and/or" but he said that the offense was clearly charged and that only the thing wrongfully appropriated was somewhat uncertain. He felt that the record showed that the accused was not in the dark because of the specification and that his plea of guilty was made knowingly.

(*U. S. v. Autrey*, United States Court of Military Appeals, March 24, 1961, Ferguson, J., 12 U.S.C.M.A. 252.)

Evidence . . .

attorney-client privilege

The Supreme Court of Ohio, with two judges dissenting, has held that an attorney is bound under the attorney-client privilege not to testify concerning his observations of the mental competency of a testator who consulted the attorney but whose will was drawn by another.

The attorney was called to the testator's house to prepare a will, but left after about a half hour without doing so. The next day another lawyer was called and he drew the will. In a subsequent will contest, based on the testator's alleged incompetency to make a will, the attorney was called as a witness by the contestants, but the trial judge sustained objections to his testifying on the ground that his testimony would concern a privileged communication.

The Supreme Court of Ohio affirmed. The Court ruled first that the privilege attached although no attorney-client

relationship actually arose between the testator and the witness. It pointed out that the purpose of the attorney-client privilege rule is to permit complete freedom of disclosure by the client to the attorney without fear that the things disclosed will be revealed. This must of necessity be done before the actual contract of employment is made, the Court said. "In order for a person to have complete freedom in seeking the services of an attorney", it remarked, "it necessarily follows that disclosures made by such person to an attorney with a view of enlisting the attorney's services in his behalf fall within the rule..."

Secondly, the Court held that "communications" may refer to observations made by an attorney of the client and are not confined to oral or written material. It stated that an attorney may testify when he is a witness to his client's will because in that instance the client has waived the privilege, but that he cannot testify concerning his observations of the client when he is not a witness.

"[T]he rule must be", the Court said, "that knowledge gained by an attorney during the attorney-client relationship, which knowledge relates to the services for which he was employed, whether it be by words or merely by observations made by the attorney, falls within the rule relating to privileged communications."

(*Taylor v. Sheldon*, Supreme Court of Ohio, April 5, 1961, Matthias, J., 172 Ohio St. 118.)

Unauthorized Practice . . . standing to sue

An incorporated bar association has no standing in Maryland to bring an unauthorized practice of law injunction suit, the Court of Appeals of Maryland has held. Since the suit was commenced by an incorporated county bar association and included no individual plaintiffs, the Court has affirmed dismissal of the complaint.

The result of the case is largely the result of Maryland law and the Court, recognizing this, refused to follow contrary decisions in other states, saying it would leave "innovation to the legislature". A long line of Maryland

cases has denied to professional, vocational and class associations standing to sue to prevent the unlawful practice or exercise of their particular profession or vocation. Without discussing the doctrine of inherent power of the judiciary to control the practice of law, the Court declared: "We see no basis for holding that bar associations, in the guise of private, non-profit membership corporations, occupy a preferred status over other types of professional associations."

The bar association had relied on the decision of the Supreme Court of New Jersey in *New Jersey State Bar Association v. Northern New Jersey Mortgage Associates*, 123 A. 2d 498, which held that a bar association might sue, but appeared to say that individuals could not. The Maryland Court dismissed this argument by pointing out that Maryland cases have not recognized a concept that a private corporation may have standing to vindicate a public interest.

(*Bar Association of Montgomery County v. District Title Insurance Company*, Court of Appeals of Maryland, March 15, 1961, Henderson, J., 168 A. 2d 395.)

Wrongful Death . . . controlling law

Expressing solicitude for the plaintiff in a wrongful death suit, the New York Court of Appeals has held that although the death of a New York resident occurred in Massachusetts, the \$15,000 limitation on wrongful-death recoveries imposed by that state need not govern and the plaintiff may make an unlimited recovery as provided by New York law.

The plaintiff's problem was simply one of money. The decedent, a New York resident and citizen, was killed in a commercial airplane crash in Massachusetts. There the limit on a recovery is \$15,000; in New York, the state constitution prohibits any limitation. To circumvent this the plaintiff brought suit in a New York state court on a contract theory under which New York law would have applied: that the decedent and the airline made the contract of carriage in New York and that the airline violated the contract by failing to carry him safely. Therefore,

it was argued, New York law, being the law of the place the contract was made, governed and the plaintiff was not faced with a ceiling on his recovery for breach of the contract.

The Court refused to accept this theory, but, picking up a point that had not been presented, it said that "modern conditions make it unjust and anomalous to subject the traveling citizens of this state to the varying laws of other states through and over which they move". It concluded that while the suit arose under the Massachusetts act, and the plaintiff would be required to sue under it, the damages limitation would not be enforced on public policy grounds.

"An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths [that limit damages in death cases]", the Court said. "His plane may meet with disaster in a state he never intended to cross but into which his plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one state and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own state's people against unfair and anachronistic treatment of the lawsuits which result from these disasters."

The Court declared its decision did not do violence to the accepted pattern of conflict of laws rules. It treated the measure of damages as being a procedural or remedial question and thus controlled by New York law.

One judge concurred as to the holding that there was no action arising from contract, but he objected to the Court's decision going beyond that point. Two other judges did likewise, but also raised objections to the position of the Court in discarding the recovery limitation. Noting that the majority conceded that the cause of action was based on the Massachusetts statute, they wrote: "No sound reason appears why our courts, in enforcing such a right at all, should not enforce it in its entirety. This Court has no power to determine what the public policy of Massachusetts should be, and

What's New in the Law

we may not ignore foreign law affecting the substantive rights of the parties merely because such law differs from our own."

(*Kilberg v. Northeast Airlines, Inc.*, Court of Appeals of New York, January 12, 1961, Desmond, J., 9 N. Y. 2d 34, 211 N.Y.S. 2d 133.)

What's Happened Since . . .

■ On February 27, 1961, the Supreme

Court of the United States:

REVERSED unanimously (with opinion by Justice Black) the decision of the Court of Appeals for the Third Circuit in *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference*, 273 F. 2d 218 (46 A.B.A.J. 306; March, 1960). The Supreme Court held that a group of eastern railroads and their public relations firm did not

violate §§1 and 2 of the Sherman Act by a high-powered publicity and legislative campaign designed to foster the adoption and retention of strict truck legislation. The Court condemned the use of the "third-party technique" to deceive the public as to the source of publicity, but it noted that this had been used by the truckers as well as the railroads and that it could be of no consequence, although "reprehensible", so far as the Sherman Act is concerned.

Samuel Pool Weaver Constitutional Law Essay Program Is Announced by the American Bar Foundation

A new essay competition, open to members of the American Bar Association, has been announced by the American Bar Foundation. The competition was made possible by the gift of Samuel Pool Weaver, of Honolulu, and his wife, Mary Helen.

The subject of the first year's contest, which will close November 1, is "Freedom of Speech Today". The prize will be \$1,000.



Samuel Pool Weaver

The competition is the indirect result of an article in the *Journal*. Mr. Weaver, who is a former Professor of Constitutional Law at Gonzaga University School of Law, has long been interested in the growth and efficient operation of our constitutional system. Over the years, he developed the belief that there was a need for a forum where the principles announced by the Supreme Court and the practices and customs of the executive and judicial branches of the Federal Government could be discussed by members of the Bar. In 1958, he read the article in the *Journal* by Alfred J. Schweppe, of Seattle, on the enforcement of a federal court decree by the Army in Little Rock (44 A.B.A.J. 113). Mr. Weaver felt the need of encouraging similar studies. The new competition is the outcome.

Mr. Weaver is the author of *Autobiography of a Pennsylvania Dutchman* (1953) and *Hawaii, U.S.A., A Unique National Heritage* (1959). A native of Greensburg, Pennsylvania, he studied law at the University of Michigan and practiced for many years in Spokane, Washington. He taught constitutional law at Gonzaga for nineteen years, serving without remuneration except

for a small honorarium. Unable to find a suitable text, he wrote his own which was published by Callaghan & Company, of Chicago.

Mrs. Weaver is a former Law Librarian of the Supreme Court of Hawaii. She attended Wellesley College and the University of Washington, and received her law degree at Gonzaga. The couple now live in Honolulu.

The contest will be an annual competition, open to all members of the Association except members of the American Bar Foundation and officers and employees of the Foundation and the Association. In addition to essays prepared especially for the competition, the judges may consider articles on the subject that are published during 1961. Consideration of any such published essay will be given upon request of the author, contingent upon satisfactory arrangements with the publisher.

Instructions for entering the competition and complete information about the number of words, copies, footnotes and citations may be obtained by writing to "Samuel Pool Weaver Constitutional Law Essay Program, American Bar Foundation, 1155 East 60th Street, Chicago 37, Illinois".

Activities of Sections

SECTION OF ADMINISTRATIVE LAW

Heads of the "Big Six" federal agencies are to appear on the Monday afternoon program of the Section of Administrative Law at the Annual Meeting in St. Louis, August 7, in the Crystal Room of the Coronado Hotel. This event will afford an unusual opportunity to lawyers attending the Annual Meeting to hear from the chairmen of our principal federal agencies, most of whom have been only recently appointed to their important posts. Following the afternoon discussion there will be a reception in honor of these heads of agencies followed by the annual dinner, jointly sponsored by the Section of Local Government Law, at which the speaker will be General Elwood R. Quesada, former head of the Federal Aviation Agency, whose subject will be "The Public Interest vs. the Vested Interest".

On Tuesday there will be discussions of "The Model State Administrative Procedure Act", "The Administrative Conference of the United States", "Pretrial Procedures and Techniques in the Administrative Process", "Judicial Review of Administrative Agency Decisions", "Revised Rules of Practice for the NLRB", "Organization and Procedure Survey of the ICC", and a panel review of the American Bar Association's legislative program in the administrative law field. The speaker at the annual luncheon, cosponsored by the Section of Judicial Administration, will be James M. Landis, whose topic will be "Federal Agencies—1961".

The Section's Special Committee on the Administrative Conference of the United States has held several meetings in Washington and is working closely with Judge E. Barrett Prettyman, who will be in charge of the organization of this important conference. A revised Model State Administrative Procedure Act will be considered by the National Conference of Commissioners on Uni-

form State Laws at its August meeting, and the Section will review this new act and offer its views and comments to the commissioners.

There is constantly increasing interest and activity in the administrative law field. Responding to its responsibility to provide more current information to its members the Section will publish this year the first issue of the *Administrative Law News* as a supplement to the *Administrative Law Review*. Through these two publications the Section hopes to keep its members fully aware of all significant developments in administrative law at both federal and state levels.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The officers and Council of the Section note with gratification and appreciation the continued growth in Section membership which now stands at 11,211, as well as the warm reception being given both in published reviews and by the Bar generally to the *Annotations of the Model Business Corporation Act* in which the efforts of the Section's Committee on Corporate Laws under the Chairmanship of Leonard D. Adkins, of New York City, have culminated. This work is now available in three volumes through the West Publishing Company, St. Paul 2, Minnesota.

The program of the Section at its St. Louis Annual Meeting is under the direction of Willard P. Scott, Section Chairman, with the able assistance of the Section's Program Committee, of which Charles W. Steadman, of Cleveland, Ohio, and Washington, D. C., is Chairman. While full details of the program will appear in the July issue of *The Business Lawyer*, it may be especially noted here that the Section will hold its second annual reception and dinner dance on Monday, August 7, and that Postmaster General J. Ed-

ward Day will address the annual Section luncheon on Tuesday, August 8. To assure accommodation at these and other Section events requiring tickets, early purchase is recommended. Ticket application forms may be secured from the Director of Section Services, American Bar Center, Chicago 37, Illinois.

The symposia on the agenda, which like the reception and dinner dance and the annual Section luncheon are open to all members of the Association, include the symposium on "Conflicts of Interest" at which John S. Tennant, Vice President and General Counsel of United States Steel Corporation, will be moderator and at which the speakers will be George C. Watt, of Price Waterhouse & Co., and Lowell Wadmond, both of New York City, and Lloyd F. Thanhouser, Vice President and General Counsel, Continental Oil Company, Houston, Texas. George C. Seward will be moderator of a symposium on "Legal and Evidentiary Problems Arising Out of the Use of Computers and Electronic Data Processing Equipment", which will be discussed by Kenneth S. Axelson, member of a Chicago firm of accountants; Charles E. Cooper, Counsel, Bank of America; and Henry Trimble, Secretary and General Counsel, International Business Machines, Inc.

In addition to valuable presentation on August 4 and 5 by the Section's Committee on Savings and Loan Associations of which David A. Bridewell is Chairman and William C. Prather is Vice Chairman, and on August 9 by the Section's Division of Food, Drug and Cosmetic Law of which Michael F. Markel, of Washington, D. C., is Chairman, a symposium on "Agricultural Corporations" will be conducted on August 5 by William O. Weaver, Chairman of the Section's Committee on Corporate Law in Agriculture and Ranching. The significance of this important and expanding subject in the fields of corporate organization, taxation and estate planning and the solution of resulting problems will be discussed by Professor John O'Byrne, College of Law, State University of Iowa; Joel Reaves Wells, Orlando, Florida; Professor James J. Cavanaugh, Michigan State University; and E. Frederick Velikanje, Yakima, Washing-

Activities of Sections

ton. All sessions of the Section will be held at the Chase-Park Plaza Hotels.

SECTION OF FAMILY LAW

The Family Law Section has recently issued to its members its *Proceedings of the 1960 Washington Meeting* which contain the major addresses, a summary of the business conducted and also a list of addresses of Section members.

The May issue of the Section's newsletter, *The Family Lawyer*, contains the latest information about Section activities as well as highlights in the area of family law throughout the country and a number of interesting cases.

A stimulating program has been arranged for the St. Louis meeting which will feature a session on international adoptions and at which one of the speakers will be Jane Russell, of Hollywood, who is President of WAIF, and William Kirk, Executive Director of International Social Service. At another session on "Improving the Practice of the Family", the guest speakers

will be Professor Samuel Polsky, of Temple Law School, and Professor Melvin E. Heller of Temple Medical School, co-directors of the Unit in Law and Psychiatry at Temple University. A novelty feature at still another session will be a skit on "Future Collections—via Closed Circuit TV."

SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

On Friday, April 21, the Section Chairman, Floyd H. Crews, of New York, appeared before the Subcommittee on Patents, Trademarks and Copyrights of the United States Senate Committee on the Judiciary, and testified with respect to S. 1176 (Long) and S. 1084 (McClellan). These bills would require title to patents on inventions made in the course of performing a government contract be assigned to the Government. Mr. Crews' statement was based upon two resolutions of the House of Delegates, one adopted in 1950 and the other in 1959, both disapproving such a requirement.

The outstanding program of the Regional Meeting in Indianapolis was an all-day seminar on Friday, May 12, in which representatives of the Section of Patent, Trademark and Copyright Law participated, along with those of several other Sections.

Instead of talks or papers being presented in the conventional manner at the seminar, there was a lively dramatization in three acts entitled "What Every Lawyer Should Know—Or the Day Before Vacation". Outlines of the material presented in the "dramatization" were distributed to all attending the seminar.

Through the co-operation of the Office of Information Services there were three Patent Office displays at the meeting. The first was "contributions of the U. S. Patent System", which was of particular interest because it had three models as well as excellent copy on the patent system. The second was a trademark display, while the third was "How To Search", with a Recordak machine and one or two subclasses on microfilm which could be operated by any viewer.

The President's Page

(Continued from page 537)

sense their lives and influences, their battles, victories and defeats, in the quality of the traditions which we have inherited and which we must, in our turn, cherish and safeguard.

It may not be inappropriate to include here my favorite epitaph of another lawyer who died almost a hundred years ago, in 1863, and who must have had many traits in common with Tap. He was J. L. Petigru, a leader of the South Carolina Bar, whose marble stone in the churchyard of St. Michael's Episcopal Church, in Charleston, bears this beautiful and moving legend:

Future Times will hardly know
How great a Life this simple stone commemorates:
The tradition of his Eloquence,
His Wisdom and Wit may fade;
But he lived for ends more durable than Fame.
His Eloquence was the Protection of the Poor and Wronged
His learning illuminated the principles of law.
In the Admiration of his Peers
In the respect of his People
In the Affection of his Family
His was the highest Place;
The just Meed
of his Kindness and Forbearance
his Dignity and Simplicity
His brilliant Genius and his unwearied Industry.
Unawed by Opinion
Unseduced by Flattery
Undismayed by Disaster
He confronted Life with antique Courage
And death with Christian Hope.
In the great Civil War
He withstood his People for his Country:
But his people did Homage to the Man
Who held his conscience higher than their Praise;
And his Country
Heaped honours upon the grave of the Patriot,
To Whom, living,
His own righteous self-respect sufficed
Alike for Motive and Reward.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Vice Chairman,
Junior Bar Conference, Editor

One of the excellent programs planned for the Junior Bar Conference Annual Meeting, held in conjunction with the American Bar Association Annual Meeting in St. Louis, Missouri, August 4 through 8, is the panel presentation and discussion of world peace through law. Participants on this panel will be the following: Charles S. Rhyne, Past President of the American Bar Association and Chairman of the American Bar Association's Committee on World Peace Through Law; Arthur Larson, Director, World Rule of Law Center and Professor of Law at Duke University, Director, U. S. Information Agency (1956-57), Special Assistant to President Eisenhower (1957-58); and Abram J. Chayes, newly appointed legal adviser to the Department of State and a Professor at Harvard Law School (1955-1960). This program promises to present interesting viewpoints and developments in this subject area, in which the Junior Bar Conference has been active for the past two years. It is among the many interesting events and activities planned for the annual meeting, which all Conference members and their families will find worthwhile.

Legislative Activities

The Conference Committee on Legislation is actively assisting the American Bar Association's legislation program in the following areas, among others: tax benefits for savings of self-employed persons (H.R. 10 and related bills, now referred to as the Keogh-Utt Bill); legislation to provide that any member of the Bar of the highest court of any state may represent others before any federal agency other than the Patent Office, without the necessity of making application or showing other qualifications (S. 1409); and bills providing for the representation

of indigent defendants in criminal cases in the U. S. District Courts (covered in a series of bills, each somewhat different from the other).

In its efforts, the Conference's Legislation Committee has worked closely with the Association's Washington office. Junior Bar Conference members should contribute to the success of these efforts by writing their respective Congressmen and Senators, indicating from their point of view as young lawyers why these measures should be enacted.

Affiliation Activities

Petitions for affiliation with the Junior Bar Conference have been received from the Younger Lawyers Section of the East St. Louis Bar Association and from the Calhoun-Kalamazoo, Michigan, Young Lawyers' Association. Petitions from additional young lawyers' organizations are expected prior to the annual meeting, at which time these petitions will be acted upon.

State and Local Bar News

Robert S. Muckleston, of Seattle, Washington, and Winton A. Winter, of Ottawa, Kansas, respectively Conference Council members from the ninth and tenth districts, attended the meeting of the Junior Bar Section of the Wyoming Bar Conference on April 28. Robert H. Berkshire, of Omaha, Executive Council member from the eighth district, is planning to attend the meeting of the Junior Bar Section of the South Dakota Bar Association in June. William Reece Smith, of Tampa, Florida, Junior Bar Conference Chairman, is planning to attend the meeting of the Junior Bar Section of the Minnesota State Bar Association in June and a similar meeting of the State Junior Bar of Texas in July. He will also appear before the Junior Bar Section

of the Washington State Bar Association in July.

The Junior Bar Section of the Philadelphia Bar Association in April sponsored a luncheon at which it was presented by the Superintendent of the Philadelphia School District with a certificate of merit in recognition of its programs of visits to the courts by high school students and of judging inter-school debates. In April the Junior Bar Association also held a forum on the subject of representation of juveniles, indigent or otherwise, before the Juvenile Court of Philadelphia. Members of the panel included the judge of the Juvenile Court. Mercer D. Tate is the Chairman of the Junior Bar Association of Philadelphia.

On May 11 through 13, the Junior Bar Conference of Oklahoma sponsored a tax conference in Oklahoma City for general practice lawyers. Thirty-two speakers were on the program. G. Douglas Fox, of Tulsa, is the chairman of this organization.

The Younger Members Committee of the Chicago Bar Association held its second annual practical legal education course for newly admitted lawyers beginning May 23 and concluding June 8. The program included ten two-hour lectures on various subjects of particular interest to the newly admitted lawyer. Frank A. Karaba, of Chicago, is the chairman of this committee.

Indianapolis Regional Meeting

Junior Bar Conference activities at the Indianapolis Regional Meeting of the American Bar Association commenced at a luncheon on Friday, May 12, which was held jointly with the Harvard Law School Alumni Association and featured Professor Roger Fisher of the Harvard Law School as speaker. Following the luncheon, there was an afternoon meeting of Conference officials and chairmen of junior bar organizations in the states attending the regional meeting. Frank Ross, Jr., of Madison, Wisconsin, described the efforts to create a junior bar section of the Wisconsin State Bar Association, and there was considerable discussion about activities which might be useful in creating additional junior bar activities in that state.

Robert Hamilton, of Marysville,

Our Younger Lawyers

Ohio, Vice Chairman of the Junior Bar Section of the Ohio State Bar Association, reviewed the continuing legal education program which that section is sponsoring for the first time in Columbus, in August this year. This section is one of the many which have for the first time this year presented a program designed to give practical information to newly admitted lawyers. The program will last three days and will utilize the facilities of the Ohio State University.

James Schwentker, of Evansville, Indiana, Chairman of the Junior Bar Section of the Indiana State Bar Association, reviewed the program of that section during the past year, particularly the career seminars held in each of the four law schools in the state. This section is also considering the sponsorship of a legal education course for newly admitted lawyers. Gene Wilkins, of Indianapolis, secretary of the section, was also present at the meeting.

The activities of the Young Lawyers Conference of the Kentucky State Bar Association were presented by Frank Benton, of Newport, Kentucky, the state chairman. Among other things,

this includes prosecution of unauthorized practice of law cases throughout the state.

John C. Feirich, of Carbondale, Illinois, a member of the Executive Committee of the Junior Bar Section of the Illinois State Bar Association, reviewed the activities of that section, particularly the newspaper series entitled "That's the Law", which is carried in about one-hundred newspapers in the downstate Illinois area. The section is also taping twenty fifteen-minute radio programs intended to cover typical situations in which the services of lawyers are necessary. Under consideration is a practical legal education program for newly admitted lawyers to be given as a part of the continuing legal education program of the Association.

Wallace D. Riley, of Detroit, Chairman of the Younger Lawyers Section of the Michigan State Bar Association, reviewed the admission ceremony sponsored in Detroit, in which over three hundred lawyers were admitted to the Bar of the Court of Appeals for the Sixth Circuit. This section has over two thousand members and operates with an annual budget in the neighborhood of \$8,000.

At a breakfast on Saturday, May 13, Junior Bar Conference members at the meeting were privileged to hear comments on pending Association matters by Whitney North Seymour, of New York City, and Osmer C. Fitts, of Brattleboro, Vermont, respectively President and Chairman of the House of Delegates of the American Bar Association. Officials of the Junior Bar Conference in attendance included William Reece Smith, Jr., of Tampa, Florida, Junior Bar Conference Chairman; Kenneth J. Burns, Jr., Chicago, Illinois, Vice Chairman; James R. Stoner, Washington, D. C., Secretary; Wallace D. Riley, of Detroit, Michigan, and Walter F. Sheble, Washington, D. C., Directors; George Raup, Springfield, Ohio, Speaker of the Conference Assembly; and Walter R. Byars, Birmingham, Alabama, Robert H. McKinney, Indianapolis, Indiana; and John G. Weinmann, New Orleans, Louisiana, respectively, representatives of the Fifth, Seventh and Eleventh Districts on the J.B.C. Executive Council. Mr. McKinney was in charge of the Conference's program at the Regional Meeting and he was assisted by Carl Overman and Gene Wilkins, both of Indianapolis, Indiana.

AN IMPORTANT addition to the literature on the legal ramifications of oil and gas conservation has been released through the headquarters of the American Bar Association in Chicago. Entitled *Conservation of Oil and Gas, A Legal History 1948-1958*, it is an analysis of the significant conservation legislation, administrative regulations and judicial decisions affecting the production of oil and gas. Thirty-seven states and the activities of the Federal Government in the field of oil and gas conservation are treated in detail. Extracts of conservation orders treating such things as flaring of casinghead gas, the establishment of minimum prices at the well head for natural gas, the trend toward wider initial spacing of wells, and examples of voluntary and compulsory plans for the unit operation of oil pools, and water floods to stimulate secondary recovery of oil and their relation to the allocation of production according to market demand, are set forth in detail. It supplements earlier conservation histories published in 1938 and 1948. Advisory committees in each state were consulted to assure that all significant developments and trends were discussed.

Conservation activities in the several states was written by Dean Robert E. Sullivan of the Montana State University Law School who also served as editor of the entire volume. Other selections deal with significant developments in conservation by Robert E. Hardwicke, the activities of the Interstate Oil Compact Commission by Earl Foster, and Conservation in the Federal Government by Northcutt Ely. The book was prepared under the direction of a special publications committee of the Mineral and Natural Resources Law Section of the American Bar Association under the chairmanship of Earl A. Brown, Sr., of Dallas, Texas. It is available through the Interstate Oil Compact Commission, Oklahoma City, or the American Bar Association, Chicago, price \$5.00, payable in advance.

Proposed Amendments to the Association's Constitution and By-Laws

I

Notice is hereby given that Philip C. Ebeling, of Dayton, Ohio; James D. Fellers, of Oklahoma City, Oklahoma; William Poole, of Wilmington, Delaware; Lewis C. Ryan, of Syracuse, New York; and George H. Turner, of Lincoln, Nebraska, members of the Association and members of the Committee on Rules and Calendar, herewith file with the Secretary of the American Bar Association the following proposed amendments to the Constitution and By-Laws of the Association:

A. CLARIFICATION OF QUALIFICATIONS FOR MEMBERSHIP

Amend the Constitution, Article II, Section 1 by adding after the word "State" in line 2 thereof the words "or United States territory or possession", so that the first sentence of Section 1 will read as follows:

1 *Section 1. Qualifications.* Any
2 person who has been duly admit-
3 ted to the Bar of any State or
4 *United States territory or posses-*
5 *sion* and is of good moral char-
6 acter shall be eligible to member-
7 ship in the Association.

B. CENSURE, SUSPENSION OR EXPULSION OF MEMBERS

(1) Amend the Constitution, Article II, Section 4, so that present lines 1-5 thereof read as follows:

1 The Board of Governors may cen-
2 sure, suspend or expel any mem-
3 ber for cause *upon the recom-*
4 *mendation of the Committee on*
5 *Professional Grievances after a*
6 *hearing held under the direction*
7 *of that committee, in which such*
8 *person has been given full oppor-*
9 *tunity to be present and be heard*
10 *in his own defense. The Board of*
11 *Governors may suspend or drop*
12 *from membership any member*
13 *for non-payment of dues.*

(2) Amend the By-Laws, Article X,

Section 7(u) (3), so that the final sentence of Paragraph (3) (lines 44-50 thereof) will read as follows:

44 After a hearing thereon *con-*
45 *ducted* either by this Committee
46 or by its appropriate Circuit
47 Grievance Committee, *at which*
48 *the accused member shall have*
49 *been given full notice and ample*
50 *opportunity to be present and be*
51 *heard in his own defense,* this
52 Committee only shall recommend
53 to the Board of Governors the
54 censure, public or private, or
55 the suspension or expulsion of
56 the member; and the censure,
57 suspension or expulsion shall be-
58 come effective on approval of the
59 *Committee's recommendation* by
60 the Board of Governors.

C. COMPLIMENTARY RESOLUTIONS, AWARDS AND CITATIONS

Amend the By-Laws, Article V, Section 3, by adding at the end thereof the words shown in italics so that Section 3 will read as follows:

1 *Section 3. Complimentary Reso-*
2 *lutions.* No resolution compli-
3 mentary to an officer or member
4 for any services performed, paper
5 read or address delivered, shall
6 be considered by the Assembly,
7 the House of Delegates, or any
8 Section of the Association. *No*
9 *Section or Committee shall make*
10 *awards or citations to any mem-*
11 *ber, or other person, for any*
12 *services performed, paper read,*
13 *or address delivered except as*
14 *has the prior approval of the*
15 *House of Delegates or Board of*
16 *Governors.*

D. REPRESENTATION OF NATIONAL CONFERENCE OF BAR EXAMINERS IN HOUSE OF DELEGATES BY DELEGATE RATHER THAN BY CHAIRMAN

(1) Amend the Constitution, Article VI, Section 3 by deleting line 15: "The Chairman of the National Conference of Bar Examiners", and by renumbering lines 15-41 as 14-40 respectively.

(2) Amend the Constitution, Article VI, Section 8 by inserting in line 3, following the words "Judicature Society", the words "*the National Conference of Bar Examiners*".

E. REGISTRATION AND REIMBURSEMENT FOR MEETINGS OF STATE DELEGATES

(1) Amend the Constitution, Article VI, Section 5, by deleting from line 33 the words "from the continental United States" so that the first part of the sentence beginning on line 33 shall read as follows:

33 If a State Delegate shall fail to
34 register at any meeting of the
35 House of Delegates by 5 o'clock
36 P. M. on the opening day thereof
37 the office of such State Delegate
38 shall be deemed to be vacant
39 during that particular meeting...

(2) Amend the Constitution, Article IX, Section 1, by deleting from lines 30 and 31 the words "in the Continental United States", and by substituting in line 32 for the words "in this section" the word "hereinabove" so that the first sentence of the paragraph beginning on line 30 shall read as follows:

30 The traveling and other necessary
31 expenses incurred in attendance
32 at the meeting provided for *here-*
33 *inabove* shall be paid by the
34 Association.

F. CHANGE OF NAME OF SECTION

(1) Amend the Constitution, Article X, Section 2 to read as follows:

1 *Section 2. Establishment, Combi-*
2 *nation and Discontinuance.* New
3 Sections may be established and
4 existing Sections may be com-
5 bined, discontinued, or their
6 names changed by the House of
7 Delegates, after a report by the
8 Board of Governors, in the man-
9 ner provided by the By-Laws, and
10 the foregoing list shall be
11 changed in accordance with the
12 action so taken.

Italics in the text of the amendments indicates new language. The numbered lines do not correspond to the numbered lines in the Annual Report and in the Advance Program because of the difference in column width.

Proposed Amendments

(2) Amend the By-Laws, Article IX, Section 1, so that the first sentence will read as follows:

1 *Section 1. Establishing or Com-*
2 *binig Sections. New Sections*
3 *may be established and existing*
4 *Sections combined or discon-*
5 *tinued or their names changed by*
6 *the House of Delegates by two-*
7 *thirds vote, after a report by the*
8 *Board of Governors on the pro-*
9 *posal therefor.*

G. REIMBURSEMENT FOR MEETINGS HELD IN CONJUNCTION WITH ANNUAL MEETING

Amend the By-Laws, Article XIII, Section 4 by changing the period in line 8 to a semicolon, and adding the words shown in *italics*, so that Section 4 reads as follows:

1 *Section 4. No appropriation shall*
2 *be made for traveling expenses*
3 *of any member of any Advisory*
4 *Committee as such, nor shall any*
5 *appropriation be made for the*
6 *traveling or other expenses of any*
7 *member of the Board of Gover-*
8 *nors or of the House of Delegates*
9 *or of any Committee or Section*
10 *Council or Committee that are*
11 *necessary and appropriate to and*
12 *arise out of attendance as such at*
13 *the annual meeting of the Associ-*
14 *ation; nor shall any appropria-*
15 *tion be made for traveling ex-*
16 *penses for attendance at any*
17 *meeting in the area where the*
18 *annual meeting is held, during,*
19 *or in the seven days preceding or*
20 *following the period of such*
21 *meeting; but a per diem may be*
22 *provided for such attendance on*
23 *any days preceding or following*
24 *such annual meeting. This Sec-*
25 *tion shall not apply to any paid*
26 *employee of the Association.*

H. ELIMINATION OF OBSOLETE MATERIAL

(1) Amend the Constitution, Article VIII, Section 1 by eliminating lines 13 and 14: "In the year 1959, there shall be elected a President, who shall not thereafter be eligible for election to that office."

(2) Amend the Constitution, Article IX, Section 1 by eliminating from lines 17 and 18 the sentence "At such meeting held in the year 1959 the State Delegates shall make a nomination for the office of President" and by renumbering the following lines accordingly.

II

Notice is hereby given that Philip C. Ebeling, of Dayton, Ohio; James D. Fellers, of Oklahoma City, Oklahoma; William Poole, of Wilmington, Delaware; Lewis C. Ryan, of Syracuse, New York; and George H. Turner, of Lincoln, Nebraska, members of the As-

sociation and members of the Committee on Rules and Calendar; Bert H. Early, of Huntington, West Virginia; Harold H. Bredell, of Indianapolis, Indiana; Albert J. Harno, of Springfield, Illinois; Edward G. Knowles, of Denver, Colorado; and Karl C. Williams, of Rockford, Illinois, members of the Association and members of the Committee on Scope and Correlation of Work, herewith file with the Secretary of the American Bar Association the following proposed amendments to the By-Laws of the Association:

STANDING COMMITTEE ON LAWYERS AND LEGAL SERVICES IN THE DEFENSE ESTABLISHMENT

(1) Amend Article X, Section 6, by renumbering lines 18-32 inclusive to lines 19-33 respectively.

(2) Amend Article X, Section 6, by adding in proper alphabetical order, as a new line 18: "*Lawyers and Legal Services in the Defense Establish-*

ment."

(3) Amend Article X, Section 7, by redesignating paragraphs (p) through (dd), inclusive, as paragraphs (q) through (ee) respectively.

(4) Amend Article X, Section 7, by adding a new section (p) to read as follows:

1 (p) *Lawyers and Legal Services*
2 *in the Defense Establishment.*

3 (1) This committee shall have
4 jurisdiction to study and report
5 to the House of Delegates from
6 time to time with respect to all
7 matters concerning the designa-
8 tion, privileges, duties and other
9 phases of both military and
10 civilian lawyers in the Defense
11 Establishment and Legal Services
12 that are or ought to be performed
13 by military or civilian legal per-
14 sonnel, except as hereinafter
15 limited.

16 (2) This committee shall not have
17 jurisdiction of the policies and
18 procedures encompassed within
19 the scope of work of the Standing
20 Committee on Legal Assistance
21 to Servicemen except to collabo-
22 rate with such committee on mat-
23 ters concerning personnel and
24 facilities offering such legal as-
25 sistance to servicemen and their
26 dependents.

27 (3) This committee shall not have
28 jurisdiction of the policies and
29 procedures encompassed within
30 the functioning scope of any
31 Standing or Special Committee
32 on Military Justice from time to
33 time except to collaborate with
34 any such committee on matters
35 concerning personnel and facili-

36 ties dispensing military justice
37 or training personnel for such
38 service.

III

Notice is hereby given that S. David Peshkin, of Des Moines, Iowa, Louis A. Kohn, of Chicago, Illinois, and John H. Lashly, of St. Louis, Missouri, members of the American Bar Association and members of the Committee on Membership; and John C. Satterfield, of Yazoo City, Mississippi, member of the American Bar Association and President-Elect of the Association, herewith file with the Secretary of the American Bar Association the following proposed amendment to the By-Laws of the Association:

Amend the By-Laws, Article X, Section 7(r) *Membership*, by deleting in lines 1-12 thereof the following: "(1) This Committee shall consist of three members, each of whom shall serve until the adjournment of the third annual meeting following his appointment, and until his successor is appointed, provided that in the original appointment of this Committee the President shall designate one member to serve until the adjournment of the first annual meeting following his appointment, one to serve until the adjournment of the second annual meeting following his appointment, and one to serve until the adjournment of the third annual meeting following his appointment, but thereafter successors shall be appointed for three-year terms. The senior member shall act as chairman of the committee. (2)"

Article X, Section 7(r) will then read as follows:

1 (r) *Membership.* This Committee
2 shall encourage desirable appli-
3 cations for membership in the
4 Association and shall formulate
5 and recommend plans for main-
6 taining and increasing member-
7 ship. It shall have the responsi-
8 bility of giving effect to such
9 plans as are approved by the
10 House of Delegates and Board of
11 Governors.

IV

Notice is hereby given that Lewis F. Powell, Jr., of Richmond, Virginia, Luther M. Bang, of Austin, Minnesota, John D. Conner, of Washington, D. C., Philip S. Habermann, of Madison, Wisconsin, Caroline K. Simon, of New York, New York, and E. B. Smith, of Boise, Idaho, members of the Association and members of the Special Committee on Economics of Law Practice;

Whitney North Seymour, of New York, New York, member and President of the Association, and John C. Satterfield, of Yazoo City, Mississippi, member and President-Elect of the Association, herewith file with the Secretary of the American Bar Association the following proposed amendments to the By-Laws of the Association:

STANDING COMMITTEE ON ECONOMICS OF LAW PRACTICE

(1) Amend Article X, Section 6 by renumbering lines 11-32 inclusive to lines 12-33 respectively.

(2) Amend Article X, Section 6 by adding in proper alphabetical order, as a new line 11: "Economics of Law Practice."

(3) Amend Article X, Section 7 by redesignating paragraphs (i) through (dd) inclusive as paragraphs (j) through (ee) respectively.

(4) Amend Article X, Section 7 by adding a new Section (i) to read as follows:

- 1 (i) *Economics of Law Practice*
- 2 This Committee shall have jurisdiction of all matters relating to the economics of the legal profession. To this end the Committee shall cooperate with state and local bar associations as well as with sections and committees of the Association.

V

Notice is hereby given that Charles W. Pettengill, of Greenwich, Connecticut, member of the Association and Chairman of the Special Committee To Consider Amendments to the Association's Constitution and By-Laws, herewith files with the Secretary of the American Bar Association the following proposed amendments to the Constitution of the Association:

A. ELECTION OF ASSEMBLY DELEGATES BY ZONES

Amend the Constitution, Article IV, Section 3 by striking from said section, after the word "delegates" in line 4 thereof, the remainder of line 4, lines 5 and 6, and all of the words in line 7 except the last word, and substituting therefor "one of said Assembly Delegates to be elected from each of five Zones, said Zones to be made up of groupings of Districts, such Districts being described in Article IX, Section 3 of the Constitution as amended at the 1961 Annual Meeting. The Zones shall be constituted as follows:

- Zone A (Eastern), Districts 1 and 2
- Zone B (Northern), Districts 3 and 7

Zone C (Southern), Districts 4, 5 and 6

Zone D (Central), Districts 8, 9 and 10

Zone E (Western), Districts 11, 12, 13 and 14

Nominations for Assembly Delegates shall be by Zone and there shall be at least one nominee from each of the five Zones. The ballot shall be prepared showing the nominees by Zones and members of the Association voting shall be required to vote for one, and only one, delegate from each of said five Zones. Any ballot not so marked shall be void. Election in each Zone shall be by plurality of the votes cast."

By adding in line 17 between the word "successor" and the word "to", the words "from the same Zone", and in line 21 between the word "successor" and the word "shall" the words "from the same Zone" so that, as amended, Article IV, Section 3 shall read as follows:

- 1 Section 3. *Assembly Delegates.*
- 2 At each annual meeting the Assembly shall elect by printed or written ballot five members of the Association as Assembly Delegates to the House of Delegates, one of said Assembly Delegates to be elected from each of five Zones, said Zones to be made up of groupings of Districts, such Districts being described in Article IX, Section 3 of the Constitution as amended at the 1961 Annual Meeting. The Zones shall be constituted as follows:
- 3 Zone A (Eastern), Districts 1 and 2
- 4 Zone B (Northern), Districts 3 and 7
- 5 Zone C (Southern), Districts 4, 5 and 6
- 6 Zone D (Central), Districts 8, 9 and 10
- 7 Zone E (Western), Districts 11, 12, 13 and 14
- 8 Nominations for Assembly Delegates shall be by Zone and there shall be at least one nominee from each of the five Zones. The ballot shall be prepared showing the nominees by Zones and members of the Association voting shall be required to vote for one, and only one, delegate from each of the said five Zones. Any ballot not so marked shall be void.
- 9 Election in each Zone shall be by plurality of the votes cast. The term shall commence at the adjournment of the annual meeting at which such delegates are elected and shall expire at the adjournment of the third annual meeting following their election. If an

Assembly Delegate shall resign, the office of such delegate shall be deemed to be vacant. If an Assembly Delegate shall fail to register in attendance before the convening of the first session of the Assembly at the annual meeting, the office of such delegate shall be deemed to be vacant for the particular meeting, and the Assembly shall elect an interim successor from the same zone, to serve for that particular annual meeting; but if such Assembly Delegate shall fail to register in attendance before the convening of the first session of the Assembly at the succeeding annual meeting, then his office shall be declared to be vacant and a successor from the same Zone shall be elected by the Assembly to serve for the remainder of such term.

B. STATE DELEGATES

Amend Article VI, Section 4 of the Constitution by adding thereto the following sentence:

4 A State Delegate elected to any office of the Association after the adjournment of the 1961 Annual Meeting, shall, by acceptance of that elective office, be considered to have submitted his resignation as State Delegate, but said resignation shall not become effective until either his successor is elected and qualified or his senior Bar Delegate has been designated by the Credentials Committee to serve as interim State Delegate and an interim State Bar Delegate has been designated as provided in Article VI, Section 5 of this Constitution.

Amend Article VI, Section 5 of the Constitution by adding at the end of said sentence, following the word "Meeting" on line 65 thereof, the following new sentence:

65 Whenever the State Bar Association delegate with the greatest length of continuous service in the House of Delegates shall, as provided herein, serve for any interim term as State Delegate (other than for one particular meeting of the House of Delegates), said Bar Delegate shall not lose his status as Bar Delegate but shall revert to that status whenever the interim service terminates as hereinbefore provided; however, the State Bar Association may, for the period during which the Bar Delegate is serving as State Delegate, certify an interim State Bar Delegate to serve during such period with all the privileges of any other State Bar

Proposed Amendments

85 *Delegates except that the period*
86 *of service of such interim State*
87 *Bar Delegate shall not be consid-*
88 *ered in computing the length of*
89 *continuous service in the House*
90 *of Delegates.*

C. SECTION DELEGATES

Amend Article VI, Section 7 of the Constitution to read as follows:

1 Section 7. *Selection of Section*
2 *Delegates.* Each section of the
3 Association shall be entitled to
4 at least one delegate in the House
5 of Delegates. *A Section with more*
6 *than 10,000 members and less*
7 *than 20,000 members shall be en-*
8 *titled to two delegates, and a*
9 *section with more than 20,000*
10 *members shall be entitled to a*
11 *maximum of three delegates.* At
12 the Annual Meeting in each even-
13 numbered year, each Section shall
14 elect from its membership a dele-
15 gate to the House of Delegates.
16 *A Section entitled to more than*
17 *one delegate shall elect its addi-*
18 *tional delegates at successive an-*
19 *nuual meetings. Each delegate*
20 *shall serve for a term of two*
21 *years beginning with the adjourn-*
22 *ment of the Annual Meeting at*
23 *which he is elected and ending*
24 *with the adjournment of the An-*
25 *nuual Meeting of the Association*
26 *two years thereafter.* In the event
27 of the resignation, disqualification
28 or death of a Section Delegate,
29 the Council of the Section which
30 he represents shall select and
31 certify his successor for the un-
32 expired term.

D. BOARD OF GOVERNORS TO BE ELECTED FROM 14 DISTRICTS

Amend Article VII, Section 1 of the Constitution so that it will read as follows:

1 Section 1. *How Constituted.*
2 There shall be a Board of Gov-
3 ernors of the Association. The
4 Board shall consist of the Presi-
5 dent, the Chairman of the House
6 of Delegates, the President-Elect,
7 the Secretary and the Treasurer,
8 all of whom shall be members
9 ex officio, together with one mem-
10 ber from each of fourteen Districts
11 as hereinafter described who shall
12 be elected as hereinafter provid-
13 ed, provided, however, that the
14 Editor-in-Chief of the American
15 Bar Association Journal holding
16 such office on January 1, 1961,
17 shall be a member of the Board
18 of Governors so long as he con-
19 tinues to hold the office of Editor-
20 in-Chief and provided that the
21 Immediate Past President, the
22 President and the President-Elect
23 of the Association in such posi-
24 tions on January 1, 1962, shall

25 have an ex officio term of one
26 year on the Board of Governors
27 immediately following their re-
28 tirement as President of the As-
29 sociation. If the office of an elec-
30 tive member of the Board of Gov-
31 ernors shall become vacant, such
32 office shall be filled for the un-
33 expired term by a person chosen
34 by the President of the Associa-
35 tion and the members of the
36 House of Delegates from the
37 District in which the vacancy ex-
38 ists, in such manner as shall be
39 determined by the Chairman of
40 the House of Delegates. Said
41 Chairman, immediately upon
42 learning of the existence of any
43 such vacancy, shall be charged
44 with the duty of carrying this
45 provision into effect. In the ab-
46 sence of the President, the Chair-
47 man of the House of Delegates
48 shall be the presiding officer of
49 the Board of Governors.

E. CHAIRMAN OF THE HOUSE OF DELEGATES

Amend Article VIII, Section 2 of the Constitution to read as follows:

1 Section 2. *Chairman of the House*
2 *of Delegates.* A Chairman of the
3 House of Delegates, chosen from
4 the membership of the House of
5 Delegates, shall be elected by the
6 House of Delegates at the Annual
7 Meeting in even-numbered years
8 by a majority vote of those pres-
9 ent and voting, and shall serve for
10 the term of two years beginning
11 with the adjournment of the An-
12 nual Meeting at which he is
13 elected and ending with the ad-
14 journment of the second follow-
15 ing Annual Meeting of the House
16 of Delegates. *During his term of*
17 *office he shall not hold or seek*
18 *any other office in the Association*
19 *and shall not thereafter be eli-*
20 *gible to re-election as Chairman*
21 *of the House. He likewise shall*
22 *not for four years after his term*
23 *of Chairman expires be eligible*
24 *for election as President-Elect of*
25 *the Association.*

A new Section 3 of Article VIII shall be added to read as follows:

1 Section 3. *Duties of the Chair-*
2 *man of the House of Delegates*
3 *The Chairman of the House of*
4 *Delegates shall, during his term*
5 *of office, be the second ranking*
6 *officer of the Association, next to*
7 *the President. He shall, in the*
8 *absence of the President, preside*
9 *at all meetings of the Board of*
10 *Governors and shall also, in the*
11 *absence or disability of the Presi-*
12 *dent, preside at Assembly Meet-*
13 *ings of the Association, its Re-*
14 *gional Meetings, and at such*

15 other times and occasions as
16 would the President were he pres-
17 ent.

Present Section 3 of Article VIII shall become Section 4. *Vacancies.*

Present Section 4 of Article VIII shall become Section 5, and shall be amended to read as follows:

1 Section 5. *Executive Director,*
2 *Assistant Secretaries, Assistant*
3 *Treasurers.* The Board of Gov-
4 ernors may elect, and may pre-
5 scribe the duties of, an Executive
6 Director, one or more Assistant
7 Secretaries and one or more As-
8 sistant Treasurers, each of whom
9 shall hold office at the pleasure
10 of the Board of Governors. The
11 Executive Director shall be a
12 member of the Association.

F. NOMINATION OF OFFICERS AND GOVERNORS

Amend Article IX, Section 1 of the Constitution to read as follows:

1 Section 1. *Proposals by State*
2 *Delegates.* The State Delegates
3 from each State shall meet, not
4 later than one hundred and twen-
5 ty days before the opening of the
6 Annual Meeting in each year,
7 and shall promptly certify to the
8 House of Delegates the names of
9 two candidates proposed for each
10 of the following offices, President-
11 Elect and Chairman of the House
12 of Delegates (in even-numbered
13 years), and shall also certify the
14 names of at least one candidate
15 for each of the following offices,
16 Secretary, Treasurer and Mem-
17 bers of the Board of Governors
18 to be elected in that year. The
19 time and place of the meeting of
20 the State Delegates shall be fixed
21 by the Board of Governors. Not
22 less than twenty days' written
23 notice of such meeting shall be
24 sent by the Chairman of the
25 House of Delegates to each State
26 Delegate. The Chairman shall act
27 as the presiding officer of all
28 meetings of State Delegates and
29 Secretary of the Association shall
30 act as Secretary of such meet-
31 ings. A majority of the State
32 Delegates present and voting at
33 such meetings shall be entitled
34 to make such proposals. Nomi-
35 nations for all offices shall be
36 made by the House of Delegates
37 from the list of proposals certi-
38 fied by the State Delegates and
39 shall be made on the morning of
40 the first meeting day after such
41 proposals are received. In all in-
42 stances where only one candidate
43 has been certified for an office,
44 he shall be declared the nominee
45 for such office. When two or
46 more names are certified for an

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47 office, the House of Delegates
48 shall select the nominee for such
49 office by ballot. In instances
50 where more than two candidates
51 are proposed for an office, the
52 balloting shall continue until one
53 candidate has received a major-
54 ity vote. Each State shall be en-
55 titled to one vote for each dele-
56 gate seated in the House of Dele-
57 gates, but not exceeding a total
58 of four votes. In all States in
59 which more than four delegates
60 are seated in the House of Dele-
61 gates, four votes shall be apportioned
62 equally among those dele-
63 gates of the State who are pres-
64 ent and voting.
65 In the event the meeting of State
66 Delegates for proposal of the of-
67 ficers of the Association or mem-
68 bers of the Board of Governors
69 is held in conjunction with a
70 meeting of the House of Dele-
71 gates, if a State Delegate shall
72 fail to register in attendance at
73 such meeting of the House of
74 Delegates by 5:00 o'clock P. M.
75 on the opening day thereof, the
76 state bar association delegate
77 from that state then present, with
78 the greatest length of continuous
79 service (or if there be two or
80 more present with equal length
81 of service, one of them selected
82 by lot by the Chairman of the
83 House of Delegates), shall act as
84 State Delegate from that State at
85 such meeting of State Delegates.
86 The traveling and other necessary
87 expenses incurred in the conti-
88 nental United States by State
89 Delegates in attendance at the
90 meeting provided for in this sec-
91 tion shall be paid by the Associ-
92 ation. In the event of death, dis-
93 ability or declination of a mem-
94 ber nominated by the House of
95 Delegates, the State Delegates
96 shall reconvene at the Annual
97 Meeting and certify the name of
98 a candidate for that office to the
99 House of Delegates.
100 If, not earlier than one hundred
101 and fifty days and not later than
102 one hundred and twenty days
103 before the date fixed for the
104 opening of the Annual Meeting

105 of the Association in any year,
106 the Board of Governors shall rec-
107 ommend that the proposal meet-
108 ing of the State Delegates be not
109 held in that year because the
110 state of the nation or the finan-
111 cial condition of the Association
112 makes the holding of such meet-
113 ing inadvisable, the Secretary
114 shall prepare and mail promptly
115 to each State Delegate an appro-
116 priate ballot for voting upon the
117 question whether said meeting
118 shall be held, with the request
119 that such ballot, duly marked, be
120 mailed to the Secretary on a date
121 to be fixed by him. On the date
122 fixed for the return of such bal-
123 lots the Secretary shall count the
124 same and shall certify the result
125 to the Chairman of the House of
126 Delegates. If a majority of votes
127 cast shall be in favor of not hold-
128 ing such proposal meeting in that
129 year, then said proposal meeting
130 shall not be held and the State
131 Delegates in that year, in lieu of
132 making proposals at such pro-
133 posal meetings, shall make pro-
134 posals for the offices of the Asso-
135 ciation and members of the Board
136 of Governors to be elected in that
137 year, by mail ballot to be con-
138 ducted in such manner and at
139 such time as shall be determined
140 by the President of the Associa-
141 tion, the Chairman of the House
142 of Delegates and the Secretary of
143 the Association. The Secretary
144 shall promptly announce and
145 publish the proposals so made.

Eliminate present Section 3 of Article
IX and insert in lieu thereof the
following:

- 1 Section 3. Choice of Board of
- 2 Governors by Districts. A member
- 3 of the Board of Governors shall
- 4 be chosen by each of fourteen
- 5 districts as follows:
- 6 District 1: Maine, Massachu-
- 7 setts, New Hampshire, Puerto
- 8 Rico, Rhode Island
- 9 District 2: Connecticut, New
- 10 York, Vermont

- 11 District 3: Delaware, New
- 12 Jersey, Pennsylvania
- 13 District 4: District of Columbia,
- 14 Maryland, Virginia
- 15 District 5: Florida, Georgia,
- 16 North Carolina, South Carolina
- 17 District 6: Alabama, Louisiana,
- 18 Mississippi, Tennessee
- 19 District 7: Michigan, Ohio,
- 20 West Virginia
- 21 District 8: Illinois, Indiana,
- 22 Kentucky
- 23 District 9: Iowa, Missouri,
- 24 Wisconsin
- 25 District 10: Kansas, Minnesota,
- 26 Nebraska, North Dakota,
- 27 South Dakota
- 28 District 11: Arkansas, Oklahoma,
- 29 Texas
- 30 District 12: Arizona, Colorado,
- 31 New Mexico, Utah, Wyoming
- 32 District 13: Alaska, Idaho, Mon-
- 33 tana, Oregon, Washington
- 34 District 14: California, Hawaii,
- 35 Nevada

36 At the time of his nomination he
37 shall be a resident of the District
38 for which he is chosen, and shall
39 be, or shall have been, a member
40 of the House of Delegates. He
41 shall be elected for a term begin-
42 ning with the adjournment of the
43 annual meeting at which he is
44 elected and ending with the ad-
45 journment of the third annual
46 meeting next following his elec-
47 tion. In 1962 and each third year
48 thereafter, a member of the Board
49 of Governors shall be elected
50 from each the seventh, eighth,

Proposed Amendments

51 tenth, eleventh and thirteenth
52 Districts; in 1963 and each third
53 year thereafter, from the first,
54 second, fourth, sixth and twelfth
55 Districts; and in 1964 and each
56 third year thereafter, from the
57 third, fifth, ninth and fourteenth
58 Districts. In the year 1962, the
59 fourth District shall elect a mem-
60 ber of the Board of Governors
61 for an interim term of one year,
62 and the ninth District shall elect
63 a member of the Board of Gover-
64 nors for an interim term of two
65 years. All elections upon nomi-
66 nations made as hereinbefore
67 provided shall be by the House
68 of Delegates on the first day of
69 its annual meeting. The terms of
70 the present Governors from the
71 First Circuit, the Second Circuit,
72 the Sixth Circuit, and the Tenth
73 Circuit shall terminate with the
74 adjournment of the Annual Meet-
75 ing of the Association in 1963.

Eliminate present Section 4 of Article IX and insert in lieu thereof the following:

1 Section 4. *Optional Method of*
2 *Nominating and Electing Mem-*
3 *ber of Board of Governors from*
4 *a District.* If at any time the
5 State Bar Associations of a ma-
6 jority of the States in a *District*
7 decide that the member of the
8 Board of Governors from that
9 *District* shall be elected by mail
10 ballot and in writing notify the
11 Board of Elections of that deci-
12 sion, the member of the Board of
13 Governors from such *District*
14 shall thereafter be nominated by
15 the State Delegates from *District*,
16 within the times prescribed for

17 the nominations of State Dele-
18 gates; and like opportunity shall
19 be given for the making and fil-
20 ing of other nominations. There-
21 after the Board of Elections shall
22 send to all members of this As-
23 sociation in such *District* a print-
24 ed ballot for the election of such
25 member of the Board of Gover-
26 nors; and the election in and for
27 such *District* shall be conducted
28 in the same manner prescribed
29 for the election of State Delegates
30 by mail ballot. This optional
31 method of nominating and elect-
32 ing a member of the Board of
33 Governors from a *district* may be
34 discontinued at any time by a

35 majority vote of the State Bar
36 Associations in such *District*.

G. EDITOR-IN-CHIEF OF THE JOURNAL
MEMBER OF HOUSE OF DELEGATES
Amend Article VI, Section 3 of the
Constitution by inserting in line 31,
after the words "former Chairmen of
the House of Delegates" the words
"the Editor-in-Chief of the American
Bar Association Journal", thus pro-
viding that the Editor-in-Chief of the
Journal shall be a member of the
House of Delegates, provided he reg-
isters at the Annual Meeting of the
Association by 12 o'clock noon on
the opening day thereof.

Proposed Amendment to the Rules of Procedure of the House of Delegates

Notice is hereby given that Philip C. Ebeling, of Dayton, Ohio; James D. Fellers, of Oklahoma City, Oklahoma; William Poole, of Wilmington, Delaware; Lewis C. Ryan, of Syracuse, New York; and George H. Turner, of Lincoln, Nebraska, members of the Association and members of the Committee on Rules and Calendar, herewith file with the Secretary of the American Bar Association the following proposed amendment to the Rules of Procedure of the House of Delegates:

Amend Rule X, paragraph 3 of the

Rules of Procedure of the House of Delegates by inserting the word "Annual" in line 3, between the word "next" and the word "meeting"; and inserting the words "the members of" before the words "each committee" in line 1; so that paragraph 3 will read as follows:

1 3. Except where otherwise pro-
2 vided by the House, the members
3 of each committee of the House
4 shall serve until the adjournment
5 of the next annual meeting of the
6 House after their appointment,
7 and thereafter until their succes-
8 sors have been appointed.

JOSEPH D. CALHOUN
Secretary

Mineral Law Institute To Be Held in Albuquerque

Leading authorities in the field of oil, gas and mining law will address the three-day Seventh Annual Rocky Mountain Mineral Law Institute to be held at the University of New Mexico in Albuquerque opening July 27.

Twenty speakers will discuss problems in the area of mineral law, with special emphasis on the effect of conservation laws, marketing problems and the leasing of public lands for oil and gas. A special session on mining law will discuss the marketability test of discovery and other current problems.

James E. Sperling, of Albuquerque, will be general chairman of the Institute. Verle R. Seed, of the University

of New Mexico School of Law faculty, is Institute Director.

Among the speakers will be James D. Geissinger, former Regional Solicitor of the Department of the Interior, Will Mann Richardson, Vice President of the Citizens First National Bank, Tyler, Texas, and Kenneth E. Barnhill, Jr., former Executive Director of the Rocky Mountain Mineral Law Foundation.

More than 500 attorneys and executives in the oil, gas and mining industries are expected to attend the Institute, sponsored annually by the Rocky Mountain Mineral Law Foundation as part of its program of continuing legal education in the field of mineral law.

The Foundation, with offices in the law building of the University of Colorado campus, is composed of twenty-eight regional law schools, bar associations, and oil, gas and mineral associations.

Advance reservations for the Institute may be made through Verle R. Seed, Institute Director, at the University of New Mexico School of Law.

The registration fee is \$35.00. Those attending will be provided accommodations at the U.N.M. residence halls or in nearby hotels and motels.

All sessions will be held in the New Mexico Union building at the U.N.M. campus.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, John M. Skilling, Jr., Chairman; John M. Bixler, Vice Chairman.

Current Tax Planning Through Foreign Situs Trusts

By David Altman and Burton W. Kanter, Chicago, Illinois

Foreign situs accumulation trusts appear to be becoming extremely popular in tax planning because of the unique tax advantages they may offer United States citizens and residents. Not only can foreign trusts offer all of the income-shifting and deferral advantages of trusts generally, but they may also permit enjoyment by a citizen or resident of the tax exemptions accorded a non-resident alien who is not engaged in trade or business in the United States.

Unlike foreign corporations which may not be utilized satisfactorily by individual American citizens or residents to make investments in American stocks and securities (because of the impact of the personal holding company and foreign personal holding company rules of the Code), foreign trusts do offer a manageable means for such investments. This brief note will cover some aspects of present tax planning through foreign situs trusts, and, in addition, the potential effects of last year's Senate Finance Committee proposal to modify certain rules with respect to distributions to United States citizens and residents from foreign situs accumulation trusts.

Criteria Determining Foreign Situs

What criteria determine whether a trust is a foreign situs trust for federal income tax purposes is not wholly clear. There is no satisfactory definition in either the Code or the regulations as to what constitutes a foreign situs trust.¹ In fact, there may not even be an indisputable legal basis

for recognition and taxation of a foreign trust as a non-resident alien where the grantor and the beneficiary are both United States citizens or residents, even though the trust may be created in and organized under the laws of a foreign country and there is a foreign trustee acting with respect thereto.² Nevertheless, it is at present generally accepted that the mere fact that a United States citizen or resident grantor and beneficiary is involved will not require taxation on any basis other than that of a non-resident alien,³ where the characteristics of the trust otherwise qualify it as having a foreign situs.⁴

As a practical matter, it is usually deemed advisable in order to firmly establish the trust as a foreign situs trust (1) to create the trust by execution of the trust agreement in a foreign country, (2) to appoint a foreign trustee, preferably a corporate trustee having no branch and not being a branch of another company in the

United States, (3) to provide in the trust agreement that its terms be interpreted and the trust itself be governed and administered in accordance with the laws of the foreign country in which it is being established, and (4) to retain the assets of the trust wherever possible outside of the United States.⁵

In the circumstances, however, proper caution in planning is clearly in order. It must be recognized that in the absence of particular definitive legal rules for the recognition of the foreign situs of a trust, all of the facts and circumstances surrounding the establishment and operation of the trust are relevant and important to the determination of its character, and great care should be taken to evidence and support the substance of the trust arrangement.

Present Tax Treatment

1. *Grantor Taxation.* An American grantor of a foreign trust is subject to taxation on the income of the trust under the so-called *Clifford* rules of §§671-678 in the same manner as he would be had he established a domestic trust. If the particular trust arrangement does not invoke these grantor-taxation provisions, however, then the foreign trust is taxable as a separate entity.

2. *Trust Taxation.* As a non-resident alien *not engaged* in trade or business in the United States,⁶ a foreign situs trust is in general not taxable on capital gains derived from United States sources (with certain minor exceptions⁷); is not taxable on interest in-

1. §1493 does contain a definition for purposes of c. 5, as follows: "A trust shall be considered a foreign trust within the meaning of this chapter if, assuming a subsequent sale by the trustee, outside the United States and for cash, of the property so transferred, the profit, if any, from such sale would not be included in the gross income of the trust under this subtitle." See also §§402(c) and 643(a) (6) and 7456(b). See note 23.

2. See Phillips, *Taxation of Foreign Estates and Trusts Under the Internal Revenue Code of 1954*, 4 J. TAXATION 45 (1954); Roberts and Warten, *INCOME TAXATION OF NON-RESIDENT ALIENS AND FOREIGN CORPORATIONS*, page 10 (P.L.L., 1953).

3. Reg. §1.871-2; Rev. Rul. 60-181, 1960-1 Cum. Bull. 257. Also see Altman and Kanter, *Senate Finance Committee Looks at Foreign Situs Trusts*, 38 TAXES 585 (1960), discussing the significance of the Senate Finance Committee proposals in this regard.

4. For an extensive analysis of the legal criteria at present applied to determine qualification of a trust as a foreign situs trust see Hammerman, *Foreign Situs Trusts—Defining the Undefined*, 38 TAXES 529 (1960), and IRS

Clarifies Foreign-Situs Trusts as Bill To End Some Tax Benefits Dies, 13 J. TAXATION 199 (1960). See also the Altman and Kanter article cited at note 3; Winkelman, *Foreign Accumulation Trusts*, 4 TAX COUN. Q. 245 (1960).

5. While not pertinent to determining the character of the trust as a foreign situs trust, the well-advised grantor will also normally create the trust by a gift of cash and not stock or securities. Absent a prior ruling from the Commissioner to the effect that there is no tax avoidance purpose behind the transfer, the grantor who gives stock or securities which have appreciated in value, will be subject to a special 27½ per cent excise tax under Section 1491 on the appreciation in value of the stock or securities transferred. This excise tax, however, does not apply to property other than stock or securities.

6. Non-resident aliens *engaged* in trade or business in the United States are taxed on all income from United States sources regardless of its character in the same manner and at the same rates as United States citizens or residents. §§872 and 871(c).

7. Specifically, disposition of timber or coal with a retained economic interest (§631(b) and (c)) and sales or exchange of patents (§1235).

come from bank deposits in the United States; and is not taxable on any foreign source income whether ordinary or capital gain in nature.⁸

The foreign trust which is a non-resident alien not engaged in trade or business in the United States and has gross income from United States sources⁹ of \$15,400 or less is taxable only on dividends, interest, rents and royalties and other fixed or determinable annual or periodical income, and certain specifically enumerated capital gains,¹⁰ at a flat withholding rate of 30 per cent,¹¹ unless there is a tax treaty with the country in which the trust is resident which reduces this rate. If such a trust has gross income from American sources of more than \$15,400,¹² then the United States individual income tax rates apply (subject, however, to restrictions on allowable deductions¹³) to the aforementioned types of income, *except* that the tax thereon may not be less than the 30 per cent withholding rate.¹⁴

3. *Beneficiary taxation.* Foreign trust distributions are taxed in the same manner as distributions from domestic trusts.¹⁵ Accumulated trust income other than United States capital gains¹⁶ is therefore subject to the throwback rule of Section 665, but may be distributed tax-free to the beneficiary if the distribution qualifies under any of the recognized throwback rule exemptions or exceptions.

The throwback rule aims at preventing the shifting of tax on trust income from high bracket trust beneficiaries to the lower bracket trust through accumulation and then later distribution in subsequent years. This is done by treating any distribution to the beneficiary of accumulated trust income of the immediately preceding five years as taxable to the beneficiary in the current year in a manner which will result in an aggregate tax approximately equal to that which would have been incurred had there been a distribution of the accumulated income in the previous years of accumulation.

The throwback rule, however, has certain well-defined exceptions, the most significant of which are: (1) distributions of income during the minority of the beneficiary; (2)

amounts distributed to meet emergency needs of the beneficiary; and last but not least (3) a final terminating distribution of the entire trust assets in a single lump sum made more than nine years after the date of the last transfer to the trust.¹⁷

Over-All Tax Savings

By reason of the foregoing non-resident alien tax rules and the throwback rule exceptions, foreign situs trusts not only may save taxes on realized capital gains derived from United States sources as well as on income from foreign sources, but also may provide the vehicle to subsequently repatriate completely tax-free the entire trust assets, including, or undiminished by, the taxes saved, to the beneficiary who is a citizen or resident of the United States. It is possible, upon termination of the trust, to distribute tax-free to the beneficiary all of the income and capital gains previously accumulated in the foreign trust and on which the trust has paid little or no federal tax. Thus bona fide foreign situs trusts may be established with a provision in the trust agreement for the accumulation of the income of the trust (except perhaps for emergency distributions) and provision for the trustee at some time after approximately ten years to terminate the trust in such a manner as to qualify under the exception to the throwback rule for making a single, final distribution of the entire corpus and the accumulated income from the trust to the American beneficiary.

Under present law, however, with respect to capital gains derived from United States sources, it may not even be necessary to bring the distribution from the foreign situs trust within an exception to the throwback rule to

make a tax-free repatriation of trust funds to the American beneficiary. Since, capital gains from United States sources do not now come within the concept of *distributable net income*, accumulated but undistributed American capital gains would not appear to be subject to the throwback rule. Therefore, with respect to accumulated United States capital gains distributions, the \$2,000 exemption and the specific exceptions to the throwback rule are irrelevant and it might be possible to make a distribution from a foreign situs trust to an American beneficiary tax-free without qualifying the distribution under the exemption from or exceptions to the present throwback rule. For example, if a foreign situs trust realized only capital gains from United States sources, since these amounts would not be includable in distributable net income, distribution could be effected by the trust tax-free to the American beneficiary in any year subsequent to the year in which capital gains were realized. To the extent that significant amounts of other types of income includable in distributable net income have been realized by the trust during the five years preceding distribution, it would, of course, be necessary to qualify the distribution under the exemption from or exceptions to the throwback rule for the distribution to be tax-free.

Illustrative Uses of Foreign Trusts

How are foreign trusts used to take full advantage of these rules? There are numerous ways, of course, but the following may be illustrative.

1. *Speculation in American Securities.* Assume a Chicagoan has decided to give \$100,000 in trust for the benefit of his children and plans for the trust

seem not to apply where the fiduciary is a trust company which has no branch in the United States and is not a subsidiary or branch of a United States bank or trust company. The rule is that if a non-resident alien is present in the United States for less than ninety days during the taxable year, net gains on capital gains transactions *effected during his presence* are taxable, and if the non-resident alien is present for more than ninety days all such net gains are taxable.

15. As indicated in the text, the so-called Clifford rules of Sections 671-678 resulting in grantor taxation are also applicable to a foreign situs trust.

16. See Berger, *Taxation of Capital Gains Realized by Trusts*, 12 TAX L. REV. 99 (1956). See also Section 643(a)(3) and Reg. Section 1.665(b)-1(a), Example 1.

17. Section 665(b).

8. Section 871.

9. See Section 871 for the definition of income from U. S. sources.


10. See note 7.

11. Class 1 category of tax under Section 871.

12. The potential value of using multiple trusts to avoid this classification should not be overlooked, though caution is well in order in view of possible multiple trust legislation.

13. Mainly, deductions are limited to the extent they are properly allocable to the gross income from United States sources subject to tax in Class 2. See Reg. §1.871-7(c)(3).

14. Class 2 category of tax under Section 871. The ninety-day presence rules under Section 871, which are applicable to both Class 1 and Class 2 categories of non-resident alien taxation, and which provide for taxation of United States net capital gains on the sale of stocks or securities under some circumstances, would



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to speculate in American and foreign stocks. If he were to carry out his program through the vehicle of a domestic trust which he would create, the trust would pay United States tax on all gains whether realized on foreign or American stocks and pay the tax at either long term or short term capital gains rates depending on the holding period of the stock. By taking the same monies and making the gift to foreign situs trusts,¹⁸ with substantially the same terms as would have been provided in the domestic trust, investment may be made in the same foreign and American stocks through purchases on either foreign or American stock exchanges, but there will be no United States tax paid on any gains realized from the sale of any of the stocks. (There would be a 30 per cent withholding tax on any dividends received from the United States with respect to American stocks, but that is all.) Later the trust may be terminated and the assets distributed under one of the exceptions to the throwback rule, in the same manner as could a domestic trust.

2. Investment in Foreign Mutual Fund. If this same Chicagoan did not wish to have the trust he is creating speculate in American and foreign stocks and wished to avoid the problems which might be involved in delegating substantial investment discretion to the foreign trust company acting as trustee, but still wished to obtain some of the potential benefits of using a foreign trust to make American and foreign stock investments, he might consider doing so through investment in shares of a foreign mutual fund. There are in existence foreign mutual funds operating as Netherlands Antilles corporations, which invest in foreign

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and United States stocks and securities. A Netherlands Antilles corporation not engaged in trade or business in the United States through a permanent establishment is not taxed by the United States on foreign income or capital gains from the United States, and because of the tax treaty with the United States¹⁹ is subject to only a 15 per cent United States withholding tax on dividends instead of the regular 30 per cent rate and to no withholding tax on interest on corporate obligations.²⁰ The tax in the Netherlands Antilles is substantially less than 4 per cent. These mutual funds can distribute or accumulate all of their income including capital gains. Distribution into the hands of a foreign situs trust will be tax-free with respect to all forms of income and it would therefore be possible to distribute these monies subsequently to a beneficiary who is a United States citizen or resident tax-free from the foreign trust.

3. Owning Foreign Business Operation. Suppose instead of speculation or investment in stocks and securities be-

ing the objective, the Chicagoan is a businessman who contemplates doing business abroad. If the foreign company through which he intends to operate is ultimately successful he may desire to sell the entire operation or plan its liquidation to realize a capital gain, meanwhile having taken advantage of locating the operation in a country levying no or very little tax on the corporate income. Looking forward to the future when there may be a substantial gain, he could use foreign trusts as the shareholders of the foreign enterprise. When the stock is later sold or the company liquidated there will be no tax whatsoever realized; thus no tax will have been paid at all, either on the corporate operation or the sale of the corporate stock, and the monies may then be held in trust until such time as they may be redistributed to the beneficiary in the United States free of tax.²¹

4. Transfer of Land by Subdivider. An American real estate subdivider who is treated as a dealer for federal

18. Since the gift in trust will generally constitute a gift of a future interest the grantor will be required to file a federal gift tax return and pay any necessary gift tax. No other information returns are at present required by the Federal Government on the formation of a foreign trust. This is in contrast to the requirement for filing Form 959 on the formation or organization of a foreign corporation and the extensive reports now required under §6038 with respect to the operation of certain foreign corporations.

19. Convention Between the United States and the Netherlands With Respect to Taxes on Income and Certain Other Taxes, April 29, 1948. 62 Stat. 1757, T.I.A.S. No. 1855, 1950-1 Cum. Bull. 92, extended by supplementary protocol, June 15, 1955, 6 U.S.T. & O.I.A. part 3, 3696.

20. Interest paid by an American corporation

is not exempt from United States withholding tax if more than 50 per cent of the voting stock of the American corporation is controlled by the payee.

21. Can an American corporation take advantage of foreign situs trusts as a vehicle to repatriate tax-free accumulated profits from foreign operations? It is not inconceivable that an American corporation can be a beneficiary of a trust. But since the corporation under most circumstances would have to also be the grantor, the Clifford rules would require grantor taxation and thus preclude any possibility of a corporation availing itself of the advantages afforded individuals through use of a foreign situs trust. Query: Would it be possible to avoid this problem by having a parent corporation establish a trust making a subsidiary the beneficiary? Or could the corporation create a trust for the benefit of its shareholders?



income tax purposes might conceivably attempt to solve part of his tax problem through the use of foreign trusts. He might transfer developed American land holdings to foreign trusts and pay any necessary gift tax. The inventory character of the property in the hands of the transferors would not normally appear to taint the property after transfer to the trusts. Any subsequent sale, therefore, which is accomplished in a fashion which does not put the trusts in the position of engaging in trade or business in the United States could result in a capital gain free of United States tax. These proceeds in due course could be repatriated to the United States beneficiaries of the trust, also tax free. A caveat to be kept well in mind, however, is that the presence of the trust *res* in the United States might possibly jeopardize the foreign situs character of the trust.

5. *Licensing Patent Rights.* Suppose an individual who is a United States citizen holds certain American and foreign patent rights. If he licensed these rights himself, all of his royalties would be taxed to him as ordinary income. He might consider, instead, transferring either by way of gift or sale all of these rights to foreign trusts. The trusts in turn might incorporate these rights in a Netherlands Antilles corporation to take advantage of the exemption of royalty payments earned from American licensees from the 30 per cent United States withholding tax. To avoid the personal holding company penalty provisions²² the Netherlands Antilles corporation, after paying that country's low tax, would distribute all of its income. Since the shareholders are foreign trusts the distribution would not normally be subject to any additional tax if the situs of the trusts is a country imposing no tax. Repatriation of the funds to the American beneficiary tax-free could be made at a later date beyond the limits of the throwback rule.

Finance Committee Proposals

The Senate Finance Committee in the last session of Congress approved as part of its proposed "Trust and Partnership Income Tax Revision Act of 1960" provisions: (1) to broaden the definition of *distributable net income* subject to the throwback rule to include capital gains derived from United States sources exempt from tax under Section 871; and (2) to eliminate the \$2,000 exemption and the various specific exceptions to the throwback rule now provided for under Section 665(b) of the Code in the case of "accumulation distributions by foreign trusts to United States citizens or residents" to the extent "such distributions are deemed to consist of income from foreign sources or net capital gains from the sale or exchange of capital assets which are not subject to U.S. tax under §871".²³

Capital gains from United States sources do not at present come within the concept of *distributable net income*, and under present law accumulated but undistributed United States capital gains would not appear to be subject to the throwback rule.²⁴ In order to bring untaxed United States capital gains within the scope of the throwback rule the Senate Finance Committee proposed to amend the Code to consider United States capital gains "which have not been subject to tax under §871" as part of *distributable*

net income.²⁵ No amendment is necessary to accomplish this with respect to foreign source income since the present Code provisions already provide for the inclusion of such income in *distributable net income*.²⁶ Such income, therefore, is subject to the throwback rule for the present and also, for the present, to the Section 665(b) exemption and exceptions to the throwback rule.

The second proposal of the Senate Finance Committee is to eliminate the \$2,000 exemption from and the specific Section 665(b) exceptions to the throwback rule. This proposed modification, however, would apply *only* to the extent a distribution from the foreign situs trust to a beneficiary who is a United States citizen or resident is attributable to previously untaxed Section 871 United States (net) capital gains and foreign source income.²⁷ This elimination of the Section 665(b) escape rules from throwback application to accumulation distributions would not apply under the proposed amendment to any other forms of income which may have been accumulated by the trust prior to distribution and which would otherwise be subject to the throwback rule. Thus, even in the case of a foreign situs trust the \$2,000 exemption and the relatively more important other exceptions under Section 665(b) would continue to apply to distributions of such other accumulated income.

22. See Sections 541 *et seq.* The effect of being considered a foreign personal holding company is to deem the corporate income to have been distributed, thus achieving substantially the same result as an actual distribution.

23. S. Rep. No. 1616, Trust and Partnership Income Tax Revisions Act of 1960, Report of the Committee on Finance To Accompany H. R. 9662 (June 18, 1960), pages 26 and 60. No comparable provision appeared in the House-passed bill.

The Finance Committee proposal also contains for the first time a definition of foreign trusts as "trusts (created by citizens or residents of the United States) subject to tax under §871 (or which would be subject to tax under §871 if they had income from sources within the United States)". The significance and shortcomings of this definition are discussed in the Altman and Kanter article cited at note 3.

24. See note 16.

25. The Senate Finance Committee proposal does not include capital gains which may have

been subject to tax under the provisions of Section 871, but were not taxable by reason of allowable deductions or exemptions of the trust; such capital gains would be regarded as having been subject to tax under Section 871 even though no tax was in fact paid.

The other tax rules regarding distributions from trusts, such as the credit allowable for taxes paid by the trust in the event of application of the throwback rule, would also continue to be applicable. Also, the beneficiary would be entitled to a foreign tax credit for his share of foreign income taxes paid by the trust in cases where he receives a distribution taxable to him under Sections 661-668.

26. Section 643(a)(6).

27. The Finance Committee proposals apparently are applicable only to trusts created by United States citizens or residents for United States citizens or resident beneficiaries and not to such trusts created by non-resident aliens for United States citizens or resident beneficiaries.

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Limited Scope of Limitations

The importance of the limited scope of the proposed amendment is that various items of income which are not subject to United States tax (whether by withholding or otherwise) either because of the rules of the Internal Revenue Code or because of an applicable tax treaty, or are subject only to a reduced rate of tax under the terms of an applicable treaty, when first received by a foreign situs trust, may be accumulated and ultimately distributed tax-free under the exceptions of the throwback rule.

Under Section 871 the foreign situs trust pays no United States income tax on the following items of income when first received: (1) capital gains from United States sources, (2) United States bank interest, and (3) income from foreign sources (including capital gains). Dividends from United States sources and interest (other than bank interest) received by the trust are subject to United States withholding tax of 30 per cent, unless the trust is situated in a country with which the United States has a tax treaty which eliminates or substantially reduces the withholding tax on these or other items of income.²⁸

This untaxed or lower taxed income would all be included in "distributable net income" and subject to the throwback rule. The \$2,000 exemption and the exceptions to the throwback rule provided for under Section 665(b) would remain applicable under the proposed amendment to all of the kinds of accumulated income which are distributed, except United States capital gains which were not taxed under Section 871 and foreign source income, these two types of income being the only two with respect to which the amendment would eliminate the Section 665(b) exemption and exceptions. Therefore, United States dividends, interest on United States bank deposits and other income subject to no tax or to a reduced rate of withholding tax

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can be accumulated and even though subject to the throwback rule, can ultimately be distributed tax-free under the exemption or one of the exceptions to the throwback rule.

Amendment Would Impose "Waiting Period"

The applicable throwback period of five years would remain unchanged. Therefore, with respect to capital gains from United States sources and foreign source income to which the throwback rule exceptions will not apply, the last five years of operation of the trust must be viewed as a necessary "waiting" or "holding" period before final distribution if the maximum savings are to be achieved.

What forms might the trust investment advantageously take during the five-year "waiting" period before final distribution of the accumulated income of a foreign situs trust? It would be possible, of course, to convert the investments into non-income-producing growth properties. This would avoid realization of any income which might possibly be subject to throwback rule application. But the more satisfactory alternative may be to change the investments into assets which produce the types of income to which the throwback rule limitations and exceptions would still apply.

One possibility, therefore, would be to convert the entire trust assets for a five-year period prior to final distribution to deposits in American banks since the interest received would flow tax free to the trust under Section 871, and while included in "distributable net income" and subject to the throw-

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back rule could, upon a proper distribution from the trust, qualify for tax-free distribution under the exceptions to the throwback rule. This appears to be so even though paradoxically similar deposits in foreign banks earning interest could not be distributed under the exceptions to the throwback rule tax-free to the American beneficiary since such interest would be foreign source income, includable in distributable net income and subject to the throwback rule without benefit of any exceptions upon distribution.²⁹

28. See Rev. Rul. 60-288, I.R.B. 1960-26, 13, for a schedule of the treaty treatment of various classes of income.

29. Something of a paradox therefore exists with respect to interest and dividends earned from United States sources which might be free of United States withholding tax or subject only to a reduced United States withholding tax upon receipt by a foreign situs trust and which might be distributed tax-free under the exceptions to the throwback rule, whereas similar income from foreign sources would not be subject to the exceptions to the throwback rule.

It would seem fairly difficult despite the soundness of the technical analysis which would justify this result, to believe that this is fully in accord with the congressional intent underlying the Section 871 exemption of American bank deposit interest from United States withholding tax, or the objectives underlying the various treaty provisions which exempt from United States tax certain forms of income from United States sources or reduce the United States withholding tax rate on certain forms of income from United States sources.

In the instance of the exemption of American bank deposit interest from United States withholding tax under Section 871, the congressional philosophy and objective was to put American banks on a par with foreign banks in competition for deposits from non-resident aliens. It seems clear that in granting the Section 871 exemption for American bank deposit interest Congress had in mind non-resident aliens of the United States for whose



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It would also be possible to relocate the foreign situs trust in a country which has a treaty with the United States exempting various income from United States sources from United States withholding tax or reducing the rate of United States withholding tax. The ability to do this is effectively limited, however, to only a few possible countries which (1) impose little or no taxes of their own, (2) have a treaty with the United States (most countries which have treaties with the United States are countries which have high tax rates of their own affecting the income of the trust) and (3) have a legal system which recognizes trusts as such. Planning to accomplish these results then will require a very careful examination of the laws of the foreign country, a subject beyond the scope of this note.



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Conclusion

In appropriate circumstances, foreign situs accumulation trusts at present offer a unique means for sound and proper tax planning with the opportunity of not only shifting and deferring income tax but also of eliminating virtually all United States income tax on the trust investments. The Senate Finance Committee proposal is designed to restrict the benefits to be obtained through the use of such trusts, but the proposal also gives important recognition to the validity of foreign situs trusts. Even if these proposals were adopted, substantial opportunity

benefit the deposit was maintained and probably did not contemplate the situation we are considering, that of a foreign situs trust established by a United States citizen for the benefit of a United States citizen where the ultimate distribution of the monies on deposit must be to a United States citizen or at least would in the normal course of events be to a United States citizen. Perhaps Congress will ultimately wish to treat American bank deposit interest in the same manner as untaxed United States capital gains and foreign source income in case of distributions from foreign situs trusts to United States citizens or resident beneficiaries. Otherwise there is a favoring of American bank deposit interest for the non-resident alien which is a foreign situs trust over interest

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for savings would still be available through the use of foreign trusts. The present administration, however, has called for more stringent legislation to subject foreign trusts to the federal income tax. And, while not mentioned thus far, this may also include the use of foreign trusts. Therefore, all long-range planning which includes the use of foreign trusts must recognize and evaluate the possibility of legislative action to restrict very significantly the benefits to United States citizens and residents of using foreign trusts.

from a foreign bank deposit, and while in and of itself this might not be particularly disturbing, it also represents a discrimination in favor of an American beneficiary of a foreign situs trust in contrast to an American beneficiary of a domestic trust with respect to distributions received and otherwise subject to the throw-back rule.

The same points, of course, are substantially true of United States source income not subject to withholding tax or subject only to a reduced withholding tax as a result of a tax treaty with the country in which the foreign situs trust is established or resident.

These paradoxes and discriminations may perhaps be faced by Congress at a policy level in the current session.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The preparation of witnesses called to testify before legislative committees calls for careful planning. In the following article, Admiral Mott, the Judge Advocate General of the Navy, one not without experience in the field, gives our readers his views on the subject.

Testifying Before a Congressional Committee:

The Attorney and His Witness

by W. C. Mott, Rear Admiral, United States Navy

The Congress of the United States perhaps best exemplifies the creative genius of the framers of our Constitution. The almost two centuries of its existence have seen the taming of a continent, two industrial revolutions and the beginning of the atomic age. Through all of this and more, the Congress has demonstrated its ability to adapt itself to the changing times. This remarkable vitality is in no small measure due to the committee system, first established in 1789.

Although we tend to think of Congress in terms of floor debates and occasional filibusters, of caucuses and speeches, the fact remains that a very substantial portion of its work is done through and by its committees. The committee, whether it be one of the Senate or of the House, or whether it be a standing (permanent) or *ad hoc* committee, will play an extremely important part in the career and course of a proposed piece of legislation. The committee chairman, for example, may decide to "pigeonhole" a bill referred to his committee, an action which, for all practical purposes, means a sure but lingering death for the bill. If, however, the chairman places the bill on the committee's calendar and a hearing date is set, it is then started on the path which it must take before it can come to a vote on the floor of the Senate or House.

For those attorneys who are familiar with the inner workings of the Senate or House and the prominent part played by their committees, the importance of, and the procedures involved

in, a committee hearing are well known. For those who have not had an opportunity to become acquainted with these sometimes mysterious-seeming matters, and whose work may require them to do so, this article is written.

In representing a client who favors passage of a bill pending before a committee, an attorney has the same basic task as he has in a trial—to convince someone that his side of the case is the correct one, and to accomplish this primarily through the use of witnesses. Yet, because before a committee an attorney is seeking to persuade his "jury" to enact law, while in court he is seeking to have them apply the law as he sees it, his approach must necessarily be somewhat altered. In an article in the *Navy JAG Journal*, October, 1959, Representative Carl Vinson, of Georgia, a member of the House for almost fifty years and chairman of its Armed Services Committee, provided a guideline for this approach in these words:

Laws are nothing more, and nothing less, than the needs and concerns of the people, expressed in words and requirements.

All the laws that are enacted by the Congress, by State legislatures, or by other regulatory bodies, have as their main purpose the accomplishment of what is best for the vast majority of the citizenry of that particular government.

And the people who are elected to these offices are usually quite conscious of their responsibilities; duly appreciative of the confidence expressed by their constituents; and quite sensitive to the fact that legislators, for the

most part, are people.

In fact, if there is one lesson that must be learned early in the legislative process, it is that legislators are no different than shopkeepers, furniture dealers, bricklayers, farmers, teachers, chemists, soldiers, sailors, engineers, dentists, and salesmen. In other words, legislators are human beings endowed with the failings and strengths usually possessed by human beings. And because they act like human beings in all respects, it is not unreasonable that in dealing with them, a normal human reaction is the best form of behavior.

It is to be noted that Mr. Vinson has stated that "legislators, for the most part, are people"; few who have been called upon to testify before a congressional committee would not bear witness that our Congress is indeed a very human institution. It is made up of flesh-and-blood Congressmen, who necessarily and properly reflect the many attitudes and needs of their constituents. Collectively they represent a fusion of the separate forces and pressures of all groups and sections within our nation. Thus, the end product of the legislative process can be said truly to represent the national general interest and welfare. The day-to-day determination of this general interest is normally accomplished by action of the many congressional committees. The fusion of the diverse pressures and attitudes takes place at this point of the legislative process 99 per cent of the time. It is here, then, that the attorney must present his case, if he is ultimately to persuade Congress to enact into law the bill in which he is interested.

How does one prepare his case in order that it may be effectively presented to those who have the legislative responsibility? Let us assume that you have been retained by a client who is vitally interested in the passage of a certain bill pending before a committee of the House and that a witness is available to you who will testify on the subject matter of the bill. When you take the case, you have varying degrees of knowledge or ignorance about the following factors:

- (a) The subject matter of the testimony.
- (b) The witness' experience and ability in presenting forceful testimony.
- (c) The membership of the Committee.

On billboards, bus posters, car cards and in many other media, Braille Institute urges, "See Your Attorney."



tee (who is apt to be for and who against the legislation).

(d) What will be the legislative "climate" for our presentation? The degree to which you acquire knowledge of and dispel ignorance on each of these factors will be the first test of your success. Translation of this knowledge to the prospective witness will be the second. Final success is, in most cases, out of your hands. It will depend upon the cultivated or inherent ability of the witness and his performance before the Committee, and, of course, the merits of your case.

Turning now to the practical aspect of preparing for the hearing, what steps should be taken to make the most effective presentation of your case? The four factors set out above will provide an outline for your work from this point on.

The first factor—the subject matter of the testimony—presents substantially the same type of task as that faced by an attorney in "working up" a case for trial. Virtually every piece of proposed legislation has a past history with which you must become familiar. Previous bills of a similar nature, if any, should be researched. If committee hearings were held on such bills, obtain copies of their hearings to ascertain what questions were put to witnesses at such hearings and what positions were taken by the committee members on the bill, or parts of it; if the bill went as far as a debate on the floor of Congress, read the report of

the debate in the *Congressional Record*. In relation to your own bill, you will have to know, *inter alia*, what facts and circumstances gave rise to its drafting, what purpose it is seeking to accomplish and what amendments to it could be accepted without vitiating its effectiveness in accomplishing the purpose.

With this information at hand, try to find the answers to the specific questions which will almost certainly be asked of your witness; e.g., why is this legislation necessary? And, harder to answer, why is each provision of the legislation necessary? You should find the answers to these questions in the material which you have already collected. After you have all the facts assembled, highlighted and indexed in an orderly fashion you will be ready to take the next step forward. So far you have been studying history and background—you are now ready to answer the two big questions: first, what am I asking these legislators to enact; and second, how should I present my case to persuade them to take favorable action on it?

Here it will be helpful to list the basic and fundamental ideas which your witness will want to impress upon the committee. There shouldn't be too many, and usually won't be over three or four. From these ideas, draft a preliminary "position paper", which presents your views within the subject matter assigned your witness. Complete, comprehensive and persuasive, it should cover all the points your witness will make. This will be your

basic working paper; upon it your witness will stand or fall. When your position paper is completed you should reach a decision as to whether or not you want your witness to use an opening statement, which will lay a foundation for the committee questions to the witness. (The answers to these questions will often be the real presentation of the witness.)

As in a trial, there are no hard and fast ground rules on when to use an opening statement. Committees of the Congress vary in their attitude toward opening statements. Whether or not to have one depends on the subject, the witness' ability to articulate a well-written statement, the individual Committee members' views (especially those of the Chairman), and finally the general legislative climate with respect to the proposal. If you decide after considering these factors to have your witness use an opening statement, it should, of course, be clear, convincing, enthusiastic and as brief as may be in relation to the complexity of the subject matter of the witness' testimony. Let your words be simple, your sentences and paragraphs short. Use colorful phrases, without being florid or flamboyant. Remember that dullness is not a substitute for dignity.

Having finished your preliminary position paper and the opening statement, you are ready to prepare for cross-examination by the committee. Draw on the knowledge you have acquired from your research into previous related bills and committee hearings thereon. This research should enable you not only to foresee and prepare for many questions, but also many times to predict which committee member might ask them. Once you have set down all the probable questions which may be asked, write out answers to them—simple and to the point. The best opening statement in the world will fall flat if questions about it are not answered accurately and convincingly.

Next, assemble your position paper, the preliminary statement, your questions and answers, and a summary of all basic background in a "briefing book". Take it to your witness and suggest that he do some homework on it. Try to arrange for a session with

him after he's gone over your material. At this session be sure to caution your witness not to overstate your client's case. Sometimes enthusiasm for a particular position has caused witnesses to over-extend themselves. Remember, a large majority of the members of Congress are lawyers. Substantially all subcommittee staff members are lawyers. If a witness overstates his case he is setting the stage for an experienced cross-examiner to "puncture a balloon".

Suggest to the witness that if he finds himself having trouble getting his message across because of the complexity or technical nature of his subject, he should resort to a simple analogy if he can think of one. The most complex and difficult abstract principles can frequently be reduced to simple truths by specific examples or precedents recognizable by the ordinary layman.

Prior to the actual hearing, establish contact with appropriate members of the committee staff to insure that you

and your witnesses are thoroughly aware of committee procedures, which vary from one committee to another.

After days and nights of frantic work and preparation, the day has now arrived. Your principal sits before the committee with you beside him as a supporting witness. He reads his opening statement in a clear, loud voice with as much expression as his natural talent and the training he has allowed you to arrange permits. When he's through, you're through. If you've prepared his case well and he's done his homework, he'll answer 90 per cent of the questions without hesitation and with credit. (There'll always be about 10 per cent you can't anticipate, don't know the answer to and should volunteer to get for the record.) Don't try to help him unless he asks you or he's really lost. Interruptions disturb his train of thought. Besides, he probably knows more about the subject than you do at this point. That is why he is the principal witness.

The subject matter of the hearing may be of such scope or complexity that you will require the presence of experts to back up your principal witness. If you do require experts be sure that you have previously determined, from the appropriate committee staff member, the procedural rules as to their use. In any event, the experts should stay in the background and not testify until called upon. If so called, they should be allowed to answer the particular question asked without interruption by you or your principal witness or any of the other experts.

When you get to be a principal witness you might remember these guidelines for testifying. Be prepared. Speak up. Be courteous. Keep your temper. Don't bluff. Don't underestimate a Congressman. Don't, for heaven's sake, interrupt him. If you don't know the answer, admit it, but promise to find out and keep your promise. Be honest and straightforward and you'll be refreshing.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

ERIE V. TOMPKINS: John H. Flanagan, of the Carthage, Missouri, Bar, has been good enough to send me a copy of a speech he made on January 13, 1943, denouncing *Erie v. Tompkins* to the Lawyers Association of Kansas City, Missouri. 'Tis the regret of my life that I was not there to hear it. It has thunderous tones and argues that the Court had no right to change the law from *Swift v. Tyson*. It is too much, of course, to ask a crackpot law "perfesser" to agree with that but, of course, I thought everyone now agreed that *Erie* is wrong.

To give you some idea of the sweep of his prose, here is a "soup son":

When Cicero argued his great causes

in the Senate and the Courts, more than once his lips gave voice to these words: "*Stare decisis et non quieta movere*"—Let us adhere to the precedents, and not unsettle things which are established . . . Recognizing how the great common law, originating in tiny rivulets of judicial decision in the mother country has "broadened down from precedent to precedent" into a mighty river of settled jurisprudence, the Courts have applied the maxim as a fixed policy of jurisprudence.

I take my hat off to Lawyer Flanagan's being so far-sighted as to be able to see in January of 1943, the dangers of *Erie*. About that time, the late and grand Tom Cohen, of San Francisco, convinced me it was right. It took me awhile to believe that Tom was in error and his classmate, Jack Conway's,

argument that *Erie* was wrong, was correct. In fact, I think I gave Tom an "A" and Jack a "B" when the grades should have been reversed. This is but one more example of the unreliability of grades.

FEDERAL AID TO EDUCATION: In the April, 1961, issue of the *University of Pittsburgh Law Review* (Volume 22; \$1.50; 1401 Cathedral of Learning, Pittsburgh 13, Pennsylvania), my good friend Harry N. Rosenfield, of the District of Columbia Bar, writes on "Separation of Church and State in the Public Schools". It is the old polemicist at his best or worst, depending on your point of view.

What is valuable about the article is that Harry lists in one-two-three order all the cases in the Supreme Court with respect to the subject and he states the holding of each in one sentence. Thus, if you wish to discuss the topic, this article will be invaluable preparation, and it puts the cases in order. For instance, the 1947 case that allowed Catholic school children to ride the bus (*Everson v. Board of Education*, 330 U. S. 1) preceded the 1948 one which

said that the little atheist could not be embarrassed by his classmates leaving to pray (*McCullum v. Board of Education*, 333 U. S. 203) in another school room. The last case the Court discussed was *Zorach v. Clauson*, 343 U. S. 306, decided in 1953. Curiously, the Court held there that the little atheist would not feel bad if his classmates departed from school entirely and, dodging traffic, prayed at their parish houses several blocks away. Since I know Harry represents the Safety Council, I looked in vain for the highway injury totals incident to the Court's decision in *Zorach*.

What Lawyer Rosenfield argues is that the bus case (*Everson*) is wrong in that it is aid to a church-related school and that the last released time case (*Zorach*) is likewise wrong for the reasons given in *McCullum*. In fact, Rosenfield argues that the legal effect of reading the Bible or releasing students from school for religious purposes is unconstitutional as a violation of equal protection like segregation.

On the other hand, Mr. Rosenfield believes that Catholic children in parochial schools should be allowed Salk vaccine shots and free lunches because this is aid to the child as distinguished from the church. He notes also the problem of review of a national act in the light of the ducking rules of *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U. S. 447, which said that neither the Commonwealth of Massachusetts nor a federal taxpayer had standing to question an unconstitutional appropriation of money by the Congress. His failure to discuss this phase is no doubt due to his belief that, whether the cases are right or wrong, in any national legislation, the Congress will as a practical matter provide for review.

This is a very stimulating article. And because of its broad coverage, it will enable you to address your local club or bar association intelligently with a minimum of effort.

SCOPES V. STATE: Having once seen the courtroom at Dayton, Tennessee, where the famous "Monkey Trial"

was held, and having had the rare pleasure of hearing John and Louise Fraser Forte atop Lookout Mountain when they were recalling their entertainment of Clarence Darrow as he went to battle William Jennings Bryan, I have always had an abiding interest in *Scopes v. Tennessee*, 154 Tenn. 105, 289 S.W. 363. In the spring, 1960, issue of the *University of Chicago Law Review* (Vol. 27, No. 3; single copies \$2.25; address, 5750 South Ellis Avenue, Chicago 37, Illinois) Professors Harry Kalven, Jr., and Malcolm P. Sharp, of the University of Chicago Law School, Thomas I. Emerson, of Yale, and David Haber, of Rutgers, write the most delightful "Commemorative Case Note" about legal points presented in the *Scopes* case and evaded by the Supreme Court of Tennessee.

I am not sure whom the piece commemorates—the centennial of the publication of Charles Darwin's *The Origin of Species* or the thirty-second anniversary of the *Scopes* trial, the flavor of which was so recently and enjoyably recalled in the Broadway play and movie *Inherit the Wind*.

It caused me to recall the awful statue of William Jennings Bryan that until recently stood in Foggy Bottom at the corner of Rock Creek Drive and Constitution Avenue. Incident to the construction of the Theodore Roosevelt Bridge, the National Parks Service has removed Bill from Foggy Bottom to its yards on Haines Point in Swampoodle.

When Senator Paul Douglas discovered that Bryan was not on his feet, he asked the Park Service to lend him to his birthplace, Salem, Illinois. Since he was a Nebraskan when he gave his Cross of Gold speech, I wondered why neither Senator Curtis nor Hruska asked to get him back on his feet in Nebraska.

My friend Stanley Allen Suydam has the answer. He was once attorney for Gutzon Borglum who is blamed for making the statue. Stanley became Borglum's counsel because he represented another sculptor who was hired by the William Jennings Bryan Associ-

ation to submit sketches for a memorial to Bryan. That sculptor made the sketches but the Association never came to see them, hired Borglum and refused to pay Stanley's client \$8,000 for his sketches. As Borglum's monstrosity was being dedicated prior to presentation to the United States, Stanley Allen Suydam attached the statue for his client's bill, serving Josephus Daniels as he rose to make the dedicatory speech.

Knowing a good lawyer when he saw one, Borglum retained Suydam on the spot to represent him in connection with his Stone Mountain, Georgia, and his Black Hills, South Dakota, projects. Not being able to resist it, the impish Suydam asked his new client, whom he called by the endearing nickname of "Guts", how he had come to sculpt so terrible a statue as the one of Bryan.

"Guts" readily explained. He said, "You see, Stanley, if I don't get paid, I don't work. After I did Bryan's head, the money the Association gave me ran out. I did not do the body. To protect my professional reputation, however, you will find initialled on the top of Bryan's bald pate these words: 'The head is mine, the body is not.'"

On Friday, April 7, 1961, Stanley and I drove with Frederick Sass and William Cook to Swampoodle and, kneeling over, studied Bryan's head. While we could not make out the words, there is definitely writing carved into Bill's cranium.

It must be those Nebraska Senators Curtis and Hruska know this and thus do not oppose Senators Paul Douglas and Everett Dirksen's attempt to take the statue of William Jennings Bryan to Illinois. They probably think as I do that any distance it goes from Washington is not far enough.

It was thus appropriate for me in April of 1961 to re-read the commemorative case note of Professors Kalven, Emerson, Haber and Sharp, which I so much enjoyed on my first reading last summer and which is so timely in view of the President's education bill.

And I know now what it commemorates—the writing of Borglum on the top of Bryan's head.

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